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10 **IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

11  
12 **THE STATE OF CALIFORNIA et al.,** Plaintiffs,  
13  
14 v.  
15 **INFINEON TECHNOLOGIES AG et al.,** Defendants.  
16  
17

Case No.: C 06-4333 PJH

**PLAINTIFFS' OPPOSITION TO  
MOTION TO DISMISS FOR  
FAILURE TO STATE A CLAIM**

ORAL ARGUMENT REQUESTED

Hearing Date: February 7, 2007  
Time: 9:00 a.m.  
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Judge: Hon. Phyllis J. Hamilton

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28	N.D.Cent.Code § 54-12-02 .....	48

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2	Tenn. Const. Art. VI, § 5 .....	32
3	Tex. Const. Art. IV, § 22 .....	51
4	Utah Const. Art. I, § 11.....	53

**Other Authorities**

6	1961 Cal. Stats. c. 1023, West's Annotated Cal. Codes, Bus. & Prof. Code 16750, 7 Historical and Statutory Notes .....	44
8	21 Cong. Rec. 2457 (1890).....	20
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12	Fed. R. Civ. P. 12(b)(6).....	19
13	Hawaii House Bill No. 2668-80.....	7
14	Hawaii Sen. Standing Committee Report No. 971-80, 1980 Senate Journal, at 1494 (Haw. 15 1980) .....	7
16	II A.E. Dick Howard, Commentaries on the Constitution of Virginia 665-66 .....	55
17	Kentucky Rule of Civil Procedure 76.28(4)(C).....	9
18	Kevin J. O'Connor, <i>Is the Illinois Brick Wall Crumbling?</i> , 15 Antitrust 34 (2001).....	29
19	La. Senate Concurrent Resolution No. 39 .....	9
20	W. Reynolds & J. Wright, "A Practitioner's Guide to the Maryland Antitrust Act," 36 Md. 21 L. Rev. 323 (1976).....	38
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## **INTRODUCTION**

Defendants' Motions to Dismiss for Failure to State a Claim (hereafter "Motions") are directed at certain claims of 27 States. Defendants' motions generally are misplaced, conclusory, and fail to provide the court with each individual State's full legal authority. It must be emphasized that except for limited common issues under California's antitrust statutes, Cal. Bus. & Prof. Code § 16720 (hereafter "Cartwright Act"), each State claim affected by these motions must be individually determined based upon the law of the respective state.

## ARGUMENT

## **I. ILLINOIS BRICK DOES NOT BAR STATE INDIRECT PURCHASER CLAIMS**

Citing to *Illinois Brick v. Illinois*, 431 U.S. 720 (1977) (“*Illinois Brick*”), Defendants assert that the following Plaintiff states cannot make claims on behalf of indirect purchasers absent express statutory authority. Defendants are wrong. *Illinois Brick* is not an absolute bar to indirect purchaser claims. In *California v. ARC America Corp.*, 490 U.S. 93 (1989) (hereinafter “*Arc America Corp.*”), the Supreme Court held that the federal rule barring antitrust recovery by indirect purchasers applies only to federal antitrust law. It does not preempt state antitrust laws that allow recovery by indirect purchasers. *Id.* at 101-03.

**Alaska:** Alaska passed a specific statute allowing the Attorney General to bring claims on behalf of indirect purchasers in 2003. Nonetheless, prior to the passage of this statute Alaska's antitrust and consumer protection laws were construed to allow recovery on behalf of indirect purchasers by the attorney general.

For Alaska, this question was answered in *FTC v. Mylan Laboratories, Inc.*, 99 F. Supp. 2d 1 (D.D.C. 1999) (hereinafter “*Mylan II*”). The court held that Alaska law conferred indirect purchaser authority for restitution claims brought by the attorney general. In that case, the FTC and thirty-two states, including Alaska, claimed that defendants conspired to monopolize the market for two generic anti-anxiety prescription drugs. The states brought

1       

*parens patriae* (hereafter “*parens*”) actions for treble damages and other equitable relief under  
 2 federal law, including claims under state antitrust and consumer protection laws. On  
 3 reconsideration, the court allowed indirect purchaser claims by several states without statutory  
 4 repealers. For Alaska, the court reasoned:

5       The Alaska [Unfair Trade Practices and Consumer Protection] Act empowers the  
 6 Alaska Attorney General to bring unfair competition and consumer protection  
 7 actions under § 45.50.471. That statute states that “[w]hen the attorney general has  
 8 reason to believe that a person has used ‘an act or practice declared unlawful in AS  
 9 45.50.471 the attorney general may bring an action in the name of the state against  
 10 the person to restrain the act or practice.”” Alaska Stat. § 45.50.501(a). Alaska law  
 11 further provides that “[i]n interpreting AS 45.50.471 due consideration and great  
 12 weight should be given the interpretations of 15 U.S.C. § 45(a)(1) (§ 5(a)(1) of the  
 13 Federal Trade Commission Act).” *Id.* § 45.50.545. Given this authority, the Court  
 14 finds that Alaska is entitled to the full panoply of remedies that would be available to  
 15 the FTC under the FTC Act. The Court will therefore reinstate Alaska’s claim for  
 16 restitution on behalf of indirect purchasers.

17       *Mylan II*, 99 F. Supp. 2d at 5. Thus, the only court to directly address claims under Alaska law  
 18 for indirect purchasers found sufficient support in Alaska’s Unfair Trade Practices and  
 19 Consumer Protection Act (“UTPCPA”), Alaska Stat. 45.50.471 *et. seq.*, to support such claims,  
 20 despite the fact Alaska had no *Illinois Brick* repealer at the time.

21       The Alaska Attorney General is empowered to bring *parens* actions under Alaska Stat.  
 22 § 45.50.501(a). That statute provides “[w]hen the Attorney General has reason to believe that  
 23 a person has used “an act or practice declared unlawful in AS 45.50.471 the Attorney General  
 24 may bring an action in the name of the state against the person to restrain the act or practice.”  
 25 There is no language in this statute that limits the Attorney General’s authority to only direct  
 26 purchasers. In addition, the Alaska Supreme Court recognizes the state may bring suit even in  
 the absence of express statutory authority. *State v. First Nat’l Bank of Anchorage*, 660 P.2d  
 406, 421 (Alaska 1982). Alaska’s consumer protection and antitrust statutes (AS 45.50.580(b))  
 and AS 45.50.501(b)) provide that “[t]he court may make additional orders or judgments as  
 may be necessary to restore to a person in interest any money or property . . . that may have  
 been acquired by an act prohibited by [AS 45.50.562 through 45.50.596 and AS 45.50.471].”

1 These statutes places no restrictions on the type of recovery a court can award to remedy the  
 2 effects of the wrongful conduct, nor do they restrict claims only to direct purchasers.<sup>1</sup>

3 The Alaska Supreme Court has specifically held that antitrust violations under the  
 4 Alaska Restraint of Trade Act would also constitute violations of Alaska's UTPCPA since the  
 5 latter is much broader. *Matanuska Maid, Inc. v. State*, 620 P.2d 182, 185 (Alaska 1980).  
 6 Thus, in Alaska, the defendant's claim that "Alaska cannot pursue indirect purchaser claims  
 7 under the guise of Alaska's Unfair Trade Practices and Consumer Protection Act"  
 8 (Defendants' Motion at 5) is simply wrong. *Matanuska Maid* clearly provides that Alaska can.

9         **Arkansas:** Contrary to Defendants' claims, the Arkansas indirect purchaser statute is  
 10 retroactive. In 2003, the Arkansas Legislature passed Ark. Code Ann. § 4-75-315 *et seq.*,  
 11 which states that the Attorney General is authorized to recover actual damages or restitution on  
 12 behalf of indirect purchasers for violations of state and federal antitrust laws. By its express  
 13 language, this statute applies to all conduct from the date of enactment forward and to all  
 14 conduct that preceded its enactment so long as the Attorney General did not have "actual  
 15 knowledge" of the conduct at the time the statute was enacted. Ark. Code Ann. § 4-75-320(c)  
 16 spells out the retroactive application of the statute: "This section is not intended to allow for  
 17 the commencement of any action by the Attorney General under the provisions of this  
 18 subchapter for events occurring prior to the enactment of this section, of which the Attorney  
 19 General had **actual knowledge.**" Ark. Code Ann. § 4-75-320(c) (emphasis added).

20         The application of that statutory language to the present case is plain. The Arkansas  
 21 Attorney General did not have actual knowledge of the DRAM price fixing conspiracy at the  
 22 time the statute was enacted; no contention that the Attorney General had actual knowledge has  
 23 been made. When statutes, such as Ark. Code Ann. § 4-75-320, are clear, they should be given  
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25         <sup>1</sup> The state of Alaska may also seek restitution based on common law authority. *Porter v.*  
 26 *Warner Holding Co.*, 328 U.S. 395 (1946) (a trial court has inherent power to order restitution  
 in actions brought by the State); *First Nat'l Bank of Anchorage*, 660 P.2d at 416.

1 their plain meaning. “The first rule in considering the meaning of a statute is to construe it just  
 2 as it reads, giving the words their ordinary and usually accepted meaning in common  
 3 language.” *Mountain Home Sch. Dist. v. T.M.J. Builders*, 858 S.W.2d 74, 76 (Ark. 1993).  
 4 Because the Attorney General did not have actual knowledge of the conduct at issue, the  
 5 Attorney General is empowered to bring suit under this statute and to seek relief for Arkansas  
 6 citizens and government entities who were purchasers of the Defendants’ products.

7 The Defendants cite to a decision from a District Court in Massachusetts for the  
 8 proposition that Ark. Code Ann. § 4-75-315 should only be given prospective application. *In*  
*9 re Relafen Antitrust Litigation*, 225 F.R.D. 14, 26-27 (D. Mass. 2004) (hereinafter “*Relafen*”).  
 10 The *Relafen* decision was incorrect and it would pile error upon error for this Court to rely  
 11 upon.

12 The *Relafen* court’s ruling contained at least two significant errors. First, the court  
 13 disregarded the plain wording of the statute, which expressed the Arkansas Legislature’s intent  
 14 for the statute to be applied retroactively. “Retroactivity is a matter of legislative intent.”  
*15 Bean v. Office of Child Support Enforcement*, 9 S.W.3d 520, 526 (Ark. 2000). The  
 16 presumption of prospective application does not apply where the legislature has, in fact,  
 17 indicated “clearly and unequivocally” that the statute should apply retroactively. *Wood v. Ark.*  
*18 Dept. of Human Servs.*, 894 S.W.2d 573, 575 (Ark. 1995). Despite the clear language of the  
 19 Arkansas statute, the *Relafen* court did not conduct a meaningful analysis of the matter and  
 20 thus overlooked the actual statement of the legislature’s intent.

21 Second, the *Relafen* court also disregarded the remedial nature of Ark. Code Ann. § 4-  
 22 75-315, presuming that only prospective application was proper despite the holdings of  
 23 Arkansas’ courts that remedial legislation does not carry the normal presumption of  
 24 prospective application. Remedial statutes “should receive a more liberal construction, and  
 25 should be given a retrospective effect whenever such seems to have been the intention of the  
 26 Legislature.” *State ex rel. Moose v. Kansas City & Memphis Ry. & Bridge Co.*, 174 S.W. 248,

1       251 (Ark. 1914). “[W]e have held that retroactive application is appropriate for remedial  
 2 statutes that ‘do not disturb vested rights, or create new obligations, but only supply a new or  
 3 more appropriate remedy to enforce an existing right or obligation.’” *AKA v. Jefferson Hosp.*  
 4 *Ass’n*, 42 S.W.3d 508, 518-19 (Ark. 2001).

5              Ark. Code Ann. § 4-75-315 is a classic example of remedial legislation that did not  
 6 create any new and greater legal obligations on the Defendants. Before the statute came into  
 7 existence, the Defendants’ conduct was already illegal under numerous provisions of Arkansas  
 8 law, including Ark. Code Ann. § 4-75-309 (prohibition against price fixing). The Defendants  
 9 were already under an existing obligation to avoid price-fixing. The only change Ark. Code  
 10 Ann. § 4-75-315 brought about is that the State now has an additional enforcement tool to seek  
 11 redress for the Defendants’ breach of their longstanding legal obligations.<sup>2</sup> For these reasons,  
 12 the decision of the Massachusetts federal court in *Relafen* was plainly incorrect in its  
 13 interpretation of Arkansas law and is entitled to no weight.

14              In their second argument, the Defendants assert that the Arkansas Deceptive Trade  
 15 Practices Act (“DTPA”), Ark. Code Ann. §§ 4-88-101, *et seq.*, has no application to this case  
 16 because some courts in other states (but notably not in Arkansas) have held that consumer  
 17 protection statutes do not apply to anticompetitive conduct. There is neither any statute nor  
 18 any case law in Arkansas that would support Defendants’ proposition. Likewise, Arkansas  
 19 also has no case law precedents or statutory directive providing for the interpretation of its  
 20 state antitrust laws in accordance with federal antitrust guidelines. Therefore, neither Arkansas  
 21 courts nor this Court is obligated to consider the ruling of *Illinois Brick* in its interpretation of  
 22 the DTPA. The Arkansas Supreme Court has found the Arkansas Deceptive Trade Practices  
 23 Act to be remedial in nature, thus providing for a liberal interpretation of the Act in order to

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25              <sup>2</sup>Although, as noted, the retroactive effect of Ark. Code Ann. § 4-75-315 appears plain, if  
 26 necessary this Court should certify the question to the Arkansas Supreme Court, which may  
 answer questions of state law certified to it by a federal court. *See* Ark. Sup. Ct. Rule 6-8.

1 effectuate its underlying purposes, which are to protect the interests of the State's consumers  
 2 and legitimate business activities. *State v. R&A Inv. Co., Inc.*, 985 S.W.2d 299 (Ark. 1999).  
 3 To give meaning to these statutory interests, the Act should be construed to permit recovery for  
 4 indirect purchasers, including those consumers and governmental entities that paid inflated  
 5 prices due to the Defendants' conduct.

6 At least two reported decisions have agreed that the Arkansas DTPA is applicable to  
 7 anticompetitive conduct. *See Mylan II*, 99 F. Supp. 2d at 5; *see also In Re New Motor Vehicle*  
 8 *Canadian Export Antitrust Litigation*, 350 F. Supp. 2d 160, 177 (D. Maine 2005) (hereinafter  
 9 "Canadian Export"). In sum, the Defendants' arguments that this Court should give the  
 10 Arkansas Deceptive Trade Practices Act only a cramped and narrow reading are misconceived  
 11 and have not been accepted by any court.

12 **Florida:** Defendants' argument that "Florida's claims for damages to indirect  
 13 purchasers under the Florida Antitrust Act should be dismissed" is inapposite. Count Two of  
 14 the States' Complaint, which includes Florida as a Plaintiff, alleges that Florida state agency  
 15 and/or political subdivision Purchasers bought DRAM-containing personal computers and  
 16 servers from OEMs by means of "bid documents and/or purchasing agreements [which]  
 17 contained various assignment clauses which served to assign to Purchasers the right of OEMs  
 18 arising out of antitrust and/or unfair competition causes of action relating to DRAM." Consequently,  
 19 these assignment clauses provide Florida state agency and/or political  
 20 subdivision indirect purchasers with direct purchaser standing and entitle Florida to recover the  
 21 antitrust damages that the OEMs, as direct purchasers, would be entitled to recover absent the  
 22 assignment language.

23 In Florida, under the Florida Antitrust Act of 1980, Fla. Stat. § 542.15 *et seq.*, direct  
 24 purchasers recover treble damages, as well as attorney's fees and costs. Since the OEMs  
 25 would recover such damages under the Florida Antitrust Act as direct purchasers, *Mack v.*  
 26 *Bristol-Myers Squibb Co.*, 673 So. 2d 100 (Fla. Dist. Ct. App. 1996), therefore, Florida state

1 agency and/or political subdivision purchasers of DRAM-containing equipment would as well  
 2 by means of the assignment of their claims. Therefore, Florida's claims are valid under the  
 3 Florida Antitrust Act.

4       **Hawaii:** Defendants argue that Hawaii's claim in paragraph 140 of the Amended  
 5 Complaint should be dismissed because "the provision authorizing suits on behalf of  
 6 governmental agencies does not provide for recovery on behalf of indirect purchaser state  
 7 agencies," and that federal law does not allow indirect purchasers to sue.<sup>3</sup> Hawaii is not using  
 8 federal law as a basis to recover damages on behalf of its state agencies who were indirect  
 9 purchasers of DRAM chips. Hawaii seeks to recover damages exclusively pursuant to state  
 10 law.

11       Defendants' arguments are without merit and show that Defendants have failed to  
 12 appreciate the language of the statute. Defendants have ignored what Hawaii did in the wake  
 13 of the ruling issued in *Illinois Brick*.

14       In Hawaii, recovery by indirect purchasers has been a part of the fabric of Hawaii's  
 15 antitrust law from its beginning, and the Hawaii State Legislature took steps to clarify the  
 16 rights of indirect purchasers in the wake of the ruling in *Illinois Brick*, and to dispel any  
 17 misconceptions as regards the right of indirect purchasers to recover.

18       In 1980, the Hawaii State Legislature deliberated on House Bill No. 2668-80. The  
 19 bill's purpose was "to amend chapter 480, Hawaii Revised Statutes, relating to the bringing of  
 20 actions on behalf of indirect purchasers by the Attorney General." See Sen. Standing  
 21 Committee Report No. 971-80, 1980 Senate Journal, at 1494 (Haw. 1980); a copy is attached  
 22 hereto as Exhibit 1). The Legislature determined that it was appropriate to use the measure to  
 23 "clarify what was **originally intended** by the enactment of [the Hawaii antitrust laws]" in light  
 24 of the ruling issued in *Illinois Brick*. Exhibit 1 at p. 1. (emphasis added.)

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 26       <sup>3</sup> See Defendants' Motion at pp. 9-10. Defendants' motion incorrectly states that paragraph  
 140 of the Amended Complaint references section 480-14(b).

1       First, the Legislature affirmed its commitment to the original basic concept that the  
 2 antitrust laws were designed to benefit consumers “and others” injured by antitrust violators,  
 3 and that such intent “**was and continues to be the intent of chapter 480.**” *Id.* (emphasis  
 4 added.)

5       Second, the Legislature expressed its desire to dispel any possible misconception that  
 6 may be read into the implications of *Illinois Brick* on the rights of indirect purchasers under  
 7 Hawaii law, noting that “such right of consumers should be clarified as existing under chapter  
 8 480 irrespective of archaic notions of privity between (1) defendant manufacturers, and others  
 9 and (2) indirect consumers.” *Id.*

10      Third, the Legislature expressed its view that that “anyone” who has paid more than he  
 11 should is “sufficient basis for invoking the protection intended by [Hawaii’s] antitrust laws. *Id.*

12      Finally, the Legislature made it very clear that “indirect purchasers need simply show  
 13 in some fashion that by reason of antitrust violation their purchase prices were elevated by the  
 14 consequent illegal overcharge.” *Id.*

15      These excerpts from the Hawaii legislative history following the ruling in *Illinois Brick*  
 16 clearly show Hawaii law provides that all indirect purchasers, of whatever ilk, have a strong  
 17 basis and right to invoke the protection of the Hawaii antitrust laws, notwithstanding the ruling  
 18 in *Illinois Brick*.

19      The right to invoke the protection of the Hawaii antitrust laws extends to Hawaii state  
 20 agencies. Haw. Rev. Stat § 480-14(a) provides a broad remedy and clearly authorizes the State  
 21 to sue if it is injured by anything forbidden or declared unlawful by chapter 480:

22           (a) Whenever the State, any county, or city and county is injured in its business  
 23 or property by reason of anything forbidden or declared unlawful by this  
 24 chapter, it may sue to recover threefold the actual damages sustained by it.

25      Haw. Rev. Stat. § 480-14(a). Section 480-14(b) empowers the Attorney General to sue on  
 26 behalf of injured state agencies to recover damages provided by this section:

27           (b) The Attorney General may bring an action on behalf of the State or any of

1           its political subdivisions or governmental agencies to recover the damages  
 2           provided for by this section, or by any comparable provisions of federal law.

3 Haw. Rev. Stat. § 480-14(b). If the State as an indirect purchaser “has paid more than  
 4 [it] should and [its] property has been illegally diminished,” the Legislature has  
 5 declared that the State has “a sufficient basis for invoking the protection intended by  
 6 [Hawaii’s] antitrust laws.” Exhibit 1 at p. 1.

7           **Kentucky:** Federal courts have recognized the authority of the Kentucky  
 8 Attorney General to bring claims on behalf of its citizens under the Kentucky  
 9 Consumer Protection Act. *Mylan II*, 99 F. Supp. 2d at 6. Defendants’ motion against  
 10 Kentucky cites two federal decisions which both rely upon one ***unreported,***  
 11 ***unpublished*** state court decision of the Kentucky Court of Appeals. Kentucky Rule of  
 12 Civil Procedure 76.28(4)(C) instead mandates: “Opinions that are not to be published  
 13 shall not be cited *or used as authority* in any other case in any court of this state.”  
 14 (emphasis added.). This Court should not rely upon this case to eliminate Kentucky  
 15 consumers’ ability to seek recovery from the Defendants for their illegal actions, and  
 16 the Motion should be denied.

17           **Louisiana:** Louisiana purchasers may recover their damages in this matter  
 18 regardless of their perceived status as “direct” or “indirect” purchasers for several  
 19 reasons. The Louisiana Unfair Trade Act defines commerce as direct or indirect. La.  
 20 Rev. Stat. Ann. § 51:1402(9). The Louisiana Civil Code requires that laws on the same  
 21 subject matter be interpreted *in pari materia*. La. Civ. Code Ann. Art. 13. Louisiana  
 22 courts use the decisions of the United States Supreme Court to interpret both the  
 23 Louisiana Monopolies and the Unfair Trade Acts, although the decisions are not  
 24 controlling. *LP&L v. United Gas Pipeline Co.*, 493 So. 2d 1149, 1158 (La. 1986). This  
 25 jurisprudential law was followed by a legislative Senate Concurrent Resolution No. 39,  
 26 in 1997, which expresses similar sentiments. It provides that the Louisiana Supreme

1 Court cannot and should not allow the decisions of the United States Supreme Court to  
 2 replace its independent judgment in construing Louisiana law, which affords  
 3 Louisiana's citizens greater freedom and protection of individual liberties. Decisions  
 4 such as *Illinois Brick* cannot be used as a bright line rule against Louisiana's chief and  
 5 constitutional legal officer, to twist the meaning of Louisiana laws.

6 Moreover, La. Rev. Stat. Ann. § 51:1401 *et seq.*, was meant to supplement and  
 7 bolster the Louisiana Monopolies Act, La. Rev. Stat. Ann. § 51:122 *et seq.*, and to  
 8 condemn existing violations of it vis-a-vis *FTC v. Motion Picture Adv. Serv. Co*, 344  
 9 U.S. 392 (1953) and its progeny. As laws on the same subject matter, regulating trade  
 10 and commerce, they must be interpreted "in reference to each other," thus providing  
 11 that indirect purchasers may recover under both laws. In any case, no Louisiana Court  
 12 would construe *Free v. Abbott Laboratories, Inc.*, 176 F.3d 298 (5th Cir. 1999), an  
 13 appellate decision containing no legal or factual analysis whatsoever, against the  
 14 Attorney General. Louisiana Courts decide antitrust and unfair trade law cases on a  
 15 case-by-case basis, declining to follow a bright line rule.

16 Louisiana citizens possess an additional grant of legislative standing to recover  
 17 damages regardless of their status as direct or indirect purchasers, vis-a-vis La. Rev.  
 18 Stat. Ann. §§ 51:132-133, which apply to this matter in light of the guilty pleas entered  
 19 into the record of the criminal proceeding.

20 **Maryland:** Maryland's Attorney General has brought an action on behalf of  
 21 the State, political subdivisions and, as *parens*, persons who purchased DRAM-  
 22 containing products, to recover all remedies permitted by the Maryland Antitrust Act,  
 23 Md. Code. Ann. Com. Law § 11-201 *et seq.* ("MATA")

24 Defendants assert that Maryland law bars all indirect purchasers, except the  
 25 State itself, from recovering for illegal overcharges in violation of MATA. This  
 26 assertion is incorrect. The Maryland Antitrust Act explicitly distinguishes between

1 actions brought by the Attorney General in equity pursuant to MATA § 11-209(a) and  
 2 actions for damages pursuant to § 11-209(b). The Maryland Attorney General properly  
 3 seeks (1) restitution for natural persons and commercial entities who suffered an  
 4 antitrust injury due to the Defendants' price fixing conspiracy; and (2) damages for the  
 5 State and local governmental entities and persons who purchased DRAM-containing  
 6 medical devices.

7 Under MATA § 11-209(a), the Attorney General has express authority to bring  
 8 actions in equity to obtain *restitution* and to prevent or restrain violations of the Act.  
 9 Under MATA § 11-209(a)(3), the Attorney General may seek restitution for "any  
 10 person" of "any money" acquired from that person by means of "any violation" of  
 11 MATA.<sup>4</sup> The statutory language is clear and has no counterpart under federal law.  
 12 Indeed, MATA was amended in 1993 to change the existing state rule enunciated in  
 13 *State v. Jonathan Logan, Inc.*, 482 A.2d 1 (Md. 1984). The General Assembly now has  
 14 given the Attorney General a broad restitutionary remedy beyond the scope of federal  
 15 law.

16 The *Illinois Brick* doctrine does not bar an indirect purchaser's right to recover  
 17 equitable relief pursuant to State law claims supplemental to a complaint filed in  
 18 federal court. *Mylan II*, 99 F. Supp. 2d at 1 (States with appropriate statutes can  
 19 maintain actions for restitution on behalf of indirect purchasers with antitrust injuries)<sup>5</sup>;  
 20 see also *New York v. Feldman*, 210 F. Supp. 2d 294, 304 (S.D.N.Y. 2002) (Maryland  
 21 Attorney General has broad authority to ask a court for "restitution for any person  
 22 injured by an antitrust violation," even including non-residents) (hereinafter

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23 <sup>4</sup> Person includes an individual and all other legal or commercial entities. Md. Code Ann.  
 24 Com. Law § 11-201(f).

25 <sup>5</sup> *Davidson v. Microsoft Corp.*, 792 A.2d 336 (Md. Ct. Spec. App. 2002), cited by Defendants,  
 26 is a private class action brought for damages under MATA § 11-209(b). It does not address the  
 authority of the Attorney General to bring equitable actions for restitution under section 11-  
 209(a).

1       “*Feldman*”). So, too, here the Maryland Attorney General may seek restitution for  
 2       “any person,” whether a direct or indirect purchaser.

3           Defendants acknowledge that the State of Maryland may maintain an action for  
 4       *damages* regardless of whether it dealt directly or indirectly with the person who  
 5       committed the antitrust violation. However, MATA § 11-209(b)(2)(ii), explicitly  
 6       authorizes political subdivisions as well as the State to recover damages, even if they  
 7       are indirect purchasers.

8           Defendants concede that they cannot seek dismissal of claims made on behalf of  
 9       the State; under the plain reading of this statute they cannot seek dismissal of claims  
 10      made on behalf of Maryland’s political subdivisions either.

11          The Attorney General also may bring a damages action as *parens* on behalf of  
 12       persons residing in the State. MATA § 11-209(b)(5). If such an action involves a  
 13       “medical device,” or portion of the device,<sup>6</sup> the seller may not assert as a defense that  
 14       the persons did not deal directly with it. Md. Code Ann. Health-Gen. § 21-1114 states  
 15       that in any antitrust action brought by the Attorney General, “a person that sells,  
 16       distributes or otherwise disposes of any . . . medical device: (1) May not assert as a  
 17       defense that the person did not deal directly with the person on whose behalf the action  
 18       was brought. This statute was enacted in 2005, three years after *Davidson*, 792 A.2d  
 19       336, and one year after *Relafen*, 225 F.R.D. 14, the cases upon which Defendants rely,  
 20       and was intended to augment the existing restitution remedy.

21          In addition to each of these remedies, MATA provides that a court can assess a  
 22       civil penalty of \$100,000 per violation, payable to the General Fund of Maryland.  
 23       MATA § 11-209(a)(4). This civil penalty is unaffected by the *Illinois Brick* doctrine.

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 25       <sup>6</sup> Under Md. Code Ann. Health-Gen. § 21-101(f), “device” includes “*any part or accessory* of  
 26       an instrument, apparatus or contrivance that is intended: (1) for use in a diagnosis, care,  
          mitigation, treatment or prevention of human disease.” (emphasis added).

1           **New Hampshire:** New Hampshire's claims for relief are made pursuant to the  
 2 Cartwright Act. No claim is asserted under New Hampshire state law.

3           **Oklahoma:** Oklahoma seeks relief, including damages, for state agencies who  
 4 were indirect purchasers of DRAM under the Cartwright Act, not the Oklahoma  
 5 Antitrust Reform act or the Oklahoma Consumer Protection Act. Oklahoma seeks  
 6 restitution and other equitable relief for natural persons and state agencies under the  
 7 Oklahoma Protection Act, Okla. Stat. tit., § 15, 751 *et seq.* See *Mylan*, 99 F. Supp. 2d  
 8 at 8-9.

9           **Ohio:** The Ohio Attorney General, as the chief law enforcement officer of the  
 10 State of Ohio, brings this case to enforce the provisions of Ohio Rev. Code §§ 109.81  
 11 and 1331.01, *et seq.* ("Valentine Act"), and asserts claims for proprietary damages  
 12 suffered by Ohio and its agencies and political subdivisions, as well as to enjoin illegal  
 13 conduct. The Ohio Attorney General has the authority to act in any antitrust case for  
 14 Ohio and to obtain equitable relief. Defendants do not challenge the Ohio Attorney  
 15 General's authority to enforce the Valentine Act.

16           Defendants mischaracterize the claims asserted by the Ohio Attorney General in  
 17 arguing that Ohio's Valentine Act claims on behalf of indirect purchasers should be  
 18 dismissed citing *Johnson v. Microsoft Corp.* 834 N.E.2d 791 (Ohio 2005). Simply put,  
 19 the Ohio Attorney General has asserted no such claims. Ohio's Valentine Act claims  
 20 are for direct purchases from Defendants to which *Johnson* is clearly inapposite.  
 21 Included are claims for which the right to recovery was contractually assigned to Ohio  
 22 by a direct purchaser, and which are legally indistinguishable from direct claims. The  
 23 Attorney General has clear authority to recover for indirect purchases where causes of  
 24 action were contractually assigned to state entities and political subdivisions, placing  
 25 the State in the shoes of the direct purchaser. It is well settled that "[u]nder controlling  
 26 federal law antitrust claims are assignable." *Gulfstream III Assocs., Inc. v. Gulfstream*

1     *Aerospace Corp.*, 995 F.2d 425, 431 (3d Cir. 1993).<sup>7</sup> The Ohio Supreme Court has  
 2 long followed federal law in the interpretation of the Valentine Act. *Johnson*, 834  
 3 N.E.2d at 794-95. Thus, the Attorney General has the authority to recover under the  
 4 Valentine Act for indirect purchases where direct purchasers contractually assign their  
 5 causes of action to state entities and political subdivisions.

6                 The only non-assignment clause indirect claims set forth in the Attorney  
 7 General's complaint are brought under the Cartwright Act, not the Valentine Act.  
 8 Defendants' argument requesting dismissal of Ohio's claim on the basis of indirect  
 9 purchaser issues is without merit as it seeks dismissal of claims that do not exist.

10                 **Virginia:** The Virginia Attorney General has express state statutory authority  
 11 to represent Virginia indirect purchasers, such as consumers, in a capacity that is the  
 12 functional equivalent of *parens* authority pursuant to the Virginia Antitrust Act, Va.  
 13 Code Ann. § 59.1-9.1 *et seq.* (1974). *See In re Cardizem CD Antitrust Litigation*, 218  
 14 F.R.D. 508, 522 (D. Mich. 2003) (citing *In re Lorazepam & Clorazepate Antitrust*  
 15 *Litigation*, 205 F.R.D. 369, 386 (D.D.C. 2002)) (hereinafter “*Cardizem*”).

16                 **Washington:** The State of Washington has standing under its antitrust laws to  
 17 bring claims for relief on behalf of itself and its consumers for indirect purchases.  
 18 Wash. Rev. Code § 19.86.090. In *FTC v. Mylan Laboratories, Inc.*, 62 F. Supp. 2d 25,  
 19 52 (D.D.C. 1999) (hereinafter “*Mylan*”) the court affirmed Washington’s standing to  
 20 represent consumer indirect purchasers to recover overcharges under the Unfair Trade  
 21 Practices & Consumer Protection Act (“CPA”), Wash. Rev. Code § 19.86 *et seq.* The  
 22 *Mylan* court later upheld that standing, denying the defendants’ *Illinois Brick* motion to  
 23 dismiss. *Mylan II*, 99 F. Supp. 2d at 11. Another Michigan District Court has also  
 24 found that Washington has standing to seek relief on behalf of its indirect purchaser

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25                 <sup>7</sup> *See also E. & J. Gallo Winery v. EnCana Energy Servs.*, 2004 U.S. Dist. LEXIS 29384, \*24  
 26 (E.D. Cal. 2004)

1 consumers. *Cardizem*, 218 F.R.D. at 521. State law provides solid ground for these  
 2 decisions. Harmonizing Washington's antitrust law with the *Illinois Brick* doctrine,  
 3 Washington courts have unequivocally granted the Attorney General standing in  
 4 indirect purchaser cases.

5 In *State of Washington v. American Tobacco Co.*, No. 96-2-15056-8, 1996 WL  
 6 931316 (Wash. Sup. Ct. Nov. 19, 1996), the court concluded that direct purchaser  
 7 standing analysis did not apply to a claim brought under Wash. Rev. Code § 19.86.090,  
 8 which authorizes damages actions by the State. The court analyzed the CPA and the  
 9 policies that inform it, concluding that the broad language of Wash. Rev. Code §  
 10 19.86.090 mandated that the Washington Attorney General has indirect purchaser  
 11 standing. Paragraph two of Wash. Rev. Code § 19.86.090 authorizes damage actions  
 12 by the State where the State is "injured," without any restriction as to the type of injury.  
 13 "This broader language recognizes that the State, with its wide-ranging responsibilities  
 14 for the health and welfare of its citizens, may incur substantial damages as a result of  
 15 anti-competitive activity even though the State is not actively engaged in the sphere of  
 16 business in which an antitrust violation occurred." *American Tobacco Co.*, 1996 WL  
 17 931316 at \*1. Applying basic rules of statutory construction to this important  
 18 distinction, the court held that the State of Washington had broader standing to bring  
 19 damage claims than that accorded to private parties. *Id.* at 3.

20 The court also considered Wash. Rev. Code § 19.86.920, which provides that  
 21 state courts should be "guided" by federal law and precedent when construing the CPA,  
 22 and that the CPA "shall be liberally construed that its beneficial purposes may be  
 23 served." *Id.* But long settled precedent established that Washington courts were not  
 24 conclusively bound by federal antitrust precedents. *Id.* at 2 (citing *State v. Ralph*  
 25 *Williams' NW Chrysler Plymouth, Inc.*, 510 P.2d 233 (Wash. 1973)). Since the  
 26

1 standing provision in the CPA for the State is different from the federal statute, the  
 2 court ultimately ruled that the State had standing to proceed to trial.

3 Defendants' argument ignores this state and federal authority. Defendants rely  
 4 on *Blewett v. Abbot Laboratories*, 938 P.2d 842, 847 (Wash. Ct. App. 1997), asserting,  
 5 “[a]s a federal court in Massachusetts recently noted, this dicta appears in a section of  
 6 the opinion addressing injunctive relief, and refers to the Attorney General’s statutory  
 7 authority to ‘restrain and prevent’ antitrust violations.” Defendants’ motion at 7. But  
 8 the *Blewett* decision was **not** limited only to injunctive relief, nor did the court so limit  
 9 the Attorney General’s authority. The court cited Wash. Rev. Code § 19.86.080. *Id.* at  
 10 847 n.22. Only the first paragraph of this section speaks to injunctive relief. The  
 11 second paragraph states,

12       The court may make such additional orders or judgments as may be necessary  
 13 to restore to any person in interest any moneys or property, real or personal,  
 14 which may have been acquired by means of any act herein prohibited or  
 declared to be unlawful.

15 Wash. Rev. Code § 19.86.080. The reference to “such additional orders or judgments” affords  
 16 the State standing to obtain recoveries for indirect purchasers. As in *American Tobacco*, there  
 17 is no restriction in the statute on the nature of the additional orders or judgments that lie within  
 18 the court’s power. Under Washington’s law, such additional orders or judgments may include  
 19 restitution and damages.

20       **West Virginia:** Defendants claim that since West Virginia’s Antitrust Act is almost  
 21 identical to the Clayton Act, *Illinois Brick*’s proscriptions against indirect purchasers  
 22 recovering damages should apply. Defendants’ view is flawed and has not been followed by  
 23 any court ruling on West Virginia’s Antitrust Act. *Canadian Export*, 350 F. Supp. 2d at 175;  
 24 *In re Terazosin Hydrochloride Antitrust Litigation*, 160 F. Supp. 2d 1365, 1376 n.8 (S.D. Fla.  
 25 2001); *Mylan*, 62 F. Supp. 2d at 52-53.<sup>8</sup>

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26<sup>8</sup> Although not ruled upon by the West Virginia Supreme Court, a number of West Virginia

1       The Antitrust Act provides “any person who shall be injured in his business or property  
 2 by reason of a violation of the [Antitrust Act] may bring an action therefore . . . .” W. Va.  
 3 Code § 47-18-9. The Antitrust Act is further explained by a legislative rule promulgated by  
 4 the Attorney General and adopted by the West Virginia Legislature in 1990.<sup>9</sup>

5       Any person who is injured directly or indirectly by reason of a violation of the  
 6 West Virginia Antitrust Act, Chapter 47, Article 18, Section 1 *et seq.* of the  
 7 Code may bring an action for damages under Chapter 47, Article 18, Section 9  
 of the Code. The State and any of its political subdivisions shall be deemed a  
 person within the meaning of this Rule.

8       142 C.S.R. § 9-2.1 (attached hereto as Exhibit 2) (“Indirect Injury Rule”).

9       The Indirect Injury Rule was constitutionally enacted.<sup>10</sup> Secondly, the Attorney  
 10 General’s interpretation of the Indirect Injury Rule is not arbitrary or capricious and is entitled  
 11 to deference. *See Canadian Export*, 350 F. Supp. 2d. at 175. Furthermore, great weight should  
 12 be given to the Attorney General’s interpretation of the Antitrust Act and legislative rule unless  
 13 the interpretation is clearly erroneous. *Beckley v. Cook*, 455 S.E.2d 817 (W. Va. 1995).

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15       trial courts have expressly or implicitly allowed indirectly injured persons to recover damages  
 16 under West Virginia’s Antitrust Act. *See e.g., State ex rel. McGraw v. VISA U.S.A., Inc. et al.*,  
 17 Civ.A. No. 03-C-551 (Cir. Ct. Ohio Cty., 2005) (express determination the Attorney General is  
 18 authorized to bring an action to recover indirect damages arising from unlawful antitrust  
 behavior); *State ex rel. McGraw v. Abbott Labs.*, Civ. A. No. 01-C-180 (Cir. Ct. Wyoming Cty.  
 19 2005) (approval of antitrust settlement agreement); *State ex rel. McGraw v. GlaxoSmithKline*,  
 Civ. A. No. 04-C-245-M (Cir. Ct. Marshall Cty. 2004) (court approved antitrust settlement);  
 21 *State ex rel. McGraw v. Kimberly-Clark*, Civ. A. No.: 99-C-2349 (Cir. Ct. Kanawha Cty. 2000)  
 (court approved antitrust settlement); *Archer v. F. Hoffman-La Roche, Ltd.*, Civ. A. No. 99-C-  
 327 (Cir. Ct. Kanawha Cty. 2002) (approval of antitrust settlement). Copies of the foregoing  
 decision are attached hereto, collectively as Exhibit 3.

22       <sup>9</sup> Under West Virginia law, a properly promulgated legislative rule has the force of law except  
 23 where (i) the agency has exceeded its constitutional authority and (ii) the rule is arbitrary and  
 24 capricious. *W. Va. Health Care Cost Review Authority v. Boone Memorial Hosp.*, 472 S.E.2d  
 411, 421 (W. Va. 1996).

25       <sup>10</sup> The Indirect Injury Rule was properly promulgated and approved by the WV Legislature.  
 Thus, Defendants’ reliance on *Gray v. Marshall County Board of Education*, 367 S.E.2d 751  
 (W. Va. 1988), is misplaced. The case merely restates that the West Virginia Antitrust Act  
 “shall be construed liberally and in harmony with the ruling judicial interpretations of  
 comparable federal antitrust statutes.” W. Va. Code § 47-18-16.

1       The Antitrust Act's "harmonization" statute does not require the State to follow *Illinois*  
 2 *Brick*. U.S. District Court Judge Hornby held in *Canadian Export*, "The West Virginia  
 3 harmonization principle (particularly in a sentence calling simultaneously for 'liberal'  
 4 construction) is simply not a direct statement prohibiting indirect purchaser recovery."  
 5 *Canadian Export*, 350 F. Supp. 2d. at 174. Judge Hornby's reasoning is sound. Therefore, any  
 6 indirectly injured person in West Virginia can bring an action under the Antitrust Act.

7       Defendants claim the West Virginia Consumer Credit and Protection Act ("CCPA")  
 8 cannot be used in an action to recover damages arising from antitrust violations. However,  
 9 West Virginia submits that bid-rigging is an unfair or deceptive act or practice.<sup>11</sup>

10 **II. NEW HAMPSHIRE'S, OKLAHOMA'S AND SOUTH CAROLINA'S CLAIMS  
 11 ARE TIMELY AND ANY MOTIONS BASED ON TIMELINESS ARE  
 12 INAPPROPRIATE**

13       **Oklahoma:** Oklahoma brings this claim under the Oklahoma Consumer Protection  
 14 Act to vindicate public rights because it seeks restitution for state agencies as well as natural  
 15 persons. The Oklahoma Supreme Court has held that "statutes of limitation shall not bar any  
 16 suit by any government entity acting in its sovereign capacity to vindicate public rights."  
*Oklahoma City Mun. Improvement Auth. v. HTTB, Inc.*, 769 P.2d 131, 135 (Okla. 1988).  
 17 Furthermore, once it became aware of the Department of Justice investigation, Oklahoma still  
 18 had a duty to conduct its own investigation into the facts surrounding Defendants' conduct in  
 19 order to determine the appropriate action to take. Allowing time for a reasonable investigation  
 20 and review of the evidence would put the accrual date for this claim well within the scope of  
 21 the tolling agreement entered into on August 1, 2005. Micron's June 2002 announcements did  
 22 not provide the State of Oklahoma with sufficient information to file a complaint.

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23  
 24       <sup>11</sup> "[U]nfair methods of competition and unfair or deceptive acts or practices in the conduct of  
 25 any trade or commerce are unlawful." W. Va. Code § 46A-6-104. This statute is similar to  
 26 Section 5 of the FTC Act which is used repeatedly seeking redress of antitrust violations. See,  
*e.g.*, *Mylan*, 62 F. Supp. 2d. at 25. Moreover, the purpose of the CCPA is to compliment  
 federal law providing similar remedies. W. Va. Code § 46A-6-101(1).

1       **New Hampshire:** Defendants' claim that New Hampshire's action is untimely turns  
 2 on a question of fact not presented in the pleading, therefore it is not appropriate for a motion  
 3 to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). The date when New Hampshire became aware  
 4 of the facts underlying its claim is only relevant in context of the discovery rule. "Under the  
 5 discovery rule exception, the statute of limitations does not accrue until. . .the plaintiff knows  
 6 or reasonably should have known of its injury and. . .the causal connection between the injury  
 7 and the alleged conduct of the defendant." *Kelleher v. Marvin Lumber and Cedar Co.*, 152  
 8 N.H. 813, 824 (2005). The question of when the plaintiff became aware, or should have  
 9 become aware, of the facts underlying the claim and the causal connection to the injury is a  
 10 question of fact. *Id.* at 825 (citing *Black Bear Lodge v. Trillium Corp.*, 136 N.H. 635, 638  
 11 (1993)). New Hampshire has not admitted that it became aware of the facts underlying its  
 12 complaint in June, 2002. Only when Hynix actually pled guilty to violations of the Sherman  
 13 Antitrust Act on May 11, 2005, did New Hampshire became aware of the facts. Therefore, the  
 14 earliest the statute of limitations began to run was on May 11, 2005, and New Hampshire's  
 15 action is timely.

16       **South Carolina:** Defendants contend that the South Carolina Unfair Trade Practices  
 17 Act (SCUTPA), S.C. Code Ann. §§ 39-5-10, *et seq.*, cause of action should be dismissed as  
 18 being untimely filed. However, S.C. Code Ann. § 39-5-150 provides, "No action may be  
 19 brought under this article more than three (3) years after discovery of the unlawful conduct  
 20 which is the subject of this suit." The South Carolina Supreme Court has interpreted the  
 21 statute of limitations under the SCUTPA as being triggered within three years of discovery of  
 22 the unlawful conduct. *See Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship*, 331, S.C. 385,  
 23 503 S.E.2d 184 (S.C. Ct. App. 1999). Under this rule, the statute of limitations begins to run  
 24 "not merely by knowledge of an injury, but knowledge of facts, diligently acquired, sufficient  
 25 to put a person on notice of the existence of the cause of action against another and that this is  
 26 an objective, not subjective determination." *Grillo v. Speedrite Prods., Inc.*, 340 S.C. 498, 532

1 S.E.2d 1 (S.C. Ct. App. 2000). Contrary to Defendants' assertions, a mere retrospective  
 2 acknowledging by way of a chronology of the events does not trigger the SCUTPA.

3 In addition, the Motion to Dismiss should be denied because at the motion to dismiss  
 4 stage, the Complaint must be construed in a light most favorable to the plaintiff. *See Syverson*  
 5 *v. Int'l Bus. Machines Corp.*, 461 F.3d 1147, 1151 (9th Cir. 2006). Therefore, any  
 6 determination of the statute of limitations issue, which is a factual issue, would be premature in  
 7 that more than one inference could be drawn as to when a reasonable person would have been  
 8 on notice that the plaintiff might have had a cause of action against a defendant. Here, a  
 9 genuine issue of material fact would exist as to when the statute of limitations was triggered.  
 10 Therefore, a jury issue would be presented as to the application of the statute of limitations in  
 11 this case. *See Grillo*, 532 S.E.2d. at 6; *see also, Dunbar v. Carlson*, 341 S.C. 261, 533 S.E.2d  
 12 913 (S.C. Ct. App. 2000).

13 **III. THE STATE ATTORNEYS GENERAL HAVE PARENTS PATRIAE  
 14 AUTHORITY TO PROTECT THEIR STATES' CONSUMERS**

15 Under principles of federalism, state law, not federal, controls when a State Attorney  
 16 General may bring a state common law *parens* state antitrust claim on behalf of his or her  
 17 State's citizens. *Glanton v. AdvancePCS, Inc.*, 465 F.3d 1123, 1126 (9<sup>th</sup> Cir. 2006) (citing  
 18 *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592 (1982)  
 19 ("[G]overnmental entities have a concrete stake in the proper application of the laws of their  
 jurisdiction, giving them a sufficient basis for Article III standing in *parens patriae* cases.").<sup>12</sup>  
 20 In passing the Sherman Act, 15 U.S.C. § 1, *et seq.*, Congress intended the new federal law to  
 21 supplement, not to supersede, state antitrust laws, including both common and statutory laws.  
 22 *See, e.g.*, 21 Cong. Rec. 2457 (1890) (remarks of Sen. Sherman: the proposed legislation was

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23  
 24 <sup>12</sup> Cf., e.g., *Myers v. Richland County*, 429 F.3d 740, 749 (8th Cir. 2005) (standing to raise a  
 25 state claim is analyzed under state law); *Ohio v. United Transp.*, 506 F. Supp. 1278 at 1281,  
 26 (S.D. Ohio 1981) ("[t]he role of the Attorney General of Ohio in protecting the state's interests  
 under the federal antitrust laws is an issue governed by Ohio statutory and common law.")  
 (citing *Florida ex rel. v. Shevin v. Exxon Corp.*, 526 F.2d 266, 275 (5th Cir. 1976)).

1 intended to “supplement the enforcement of the established rules of the common and statute  
 2 law by the courts of the several states.”). The United States Supreme Court has consistently  
 3 declined to find that federal antitrust laws preempt state antitrust laws.<sup>13</sup> As one commentator  
 4 has stated:

5 Antitrust federalism has become an established part of the nation’s  
 6 antitrust enforcement regime. [Footnote omitted.] The core principles  
 7 of antitrust federalism presuppose both that: (a) federal and state  
 8 antitrust laws can differ in ways that matter; and that (b) federal and  
 9 state enforcement decisions, in any given instance, will not necessarily  
 10 be the same. . . . The mere fact that state antitrust law permits a result  
 11 that could not be achieved under federal antitrust law should not be a  
 12 basis for finding federal preemption.

13 J. Himes, *Exploring the Antitrust Operating System: State Enforcement of Federal Antitrust*  
 14 *Law in the Remedies Phase of the Microsoft Case*, 11 Geo. Mason L. Rev. 37, 45-46 (2002).

15 The Ninth Circuit also recognizes states’ *parens* interest in protecting the economic  
 16 health of their residents by redressing violations of antitrust laws. In *In re Insurance Antitrust*  
 17 *Litigation*, 938 F.2d 919, 927 (9th Cir. 1991) a case brought by the states, the Ninth Circuit  
 18 held that the “states’ interest in preventing harm to its citizens by antitrust violations, is indeed,  
 19 a prime instance of the interest that the *parens patriae* can vindicate by obtaining damages  
 20 and/or an injunction”. Thus, as further demonstrated below, Defendants’ challenges to certain  
 21 state’s authority should be rejected.

22 **Arizona:** The State of Arizona has common law *parens* authority to act for the benefit  
 23 of its citizens. *Maricopa County Cause No. MH 90-00566*, 840 P.2d 1042, 1047 (Ariz. Ct.  
 24 App. 1992). Two United States District Courts have ruled that Arizona has “specific authority  
 25 to represent consumers and to settle and release their claims” because Arizona has “express  
 26 statutory authority to represent consumers in a capacity which is the functional equivalent of

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27<sup>13</sup> See, e.g., *ARC America Corp.*, 490 U.S. at 93 (no preemption of state indirect purchaser  
 28 statute); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978) (no preemption of state  
 29 law prohibiting oil company ownership of retail service stations and requiring uniform pricing  
 30 terms); *Puerto Rico v. Shell Co.*, 302 U.S. 253 (1937) (no preemption of Puerto Rico’s local  
 31 antitrust law).

1       *parens patriae.*" *In re Lorazepam & Clorazepate Antitrust Litigation*, 205 F.R.D. 369, 386  
 2 (D.D.C. 2002) (hereinafter "*Lorazepam*"); *Cardizem*, 218 F.R.D. at 521.

3       **Illinois:** The Attorney General of Illinois has *parens* authority under both Illinois  
 4 Constitutional law and Illinois statutory law. The powers of the Attorney General are not  
 5 limited to those granted by the legislature. Instead, the Illinois Constitution grants the Attorney  
 6 General all of the powers of the office recognized at common law.

7       In this State the constitution, by creating the office of Attorney General  
 8 under its well-known common law designation and providing that he  
 9 shall perform such duties as may be prescribed by law, ingrafted upon  
 10 the office all the powers and duties of an Attorney General as known at  
 11 the common law, and gave the General Assembly power to confer  
 additional powers and impose additional duties upon him. The  
 legislature cannot, however, strip him of any of his common law powers  
 and duties as the legal representative of the State.

12       *People ex rel. Barrett v. Finnegan*, 378 Ill. 387, 392-93, 38 N.E.2d 715, 717 (1941); *accord*,  
 13       *Dep't of Mental Health v. Coty*, 38 Ill. 2d 602, 606, 232 N.E.2d 686, 689 (1967).

14       Among these Constitutionally-granted common law powers is the power to represent  
 15 the people of the State as *parens*, as has been recognized continuously for over 120 years.  
 16       E.g., *In re Volpert*, 175 B.R. 247, 256 (Bankr. N.D. Ill. 1994); *County of McLean v.*  
 17 *Humphreys*, 104 Ill. 378, 383 (1882). This power enables the Attorney General to represent  
 18 the citizens of Illinois under Illinois laws, including its Antitrust Act. *Illinois v. Bristol-Myers*  
 19 *Co.*, 470 F.2d 1276, 1278 (D.C. Cir. 1972) ("The State Supreme Court has repeatedly held that  
 20 the Attorney General has common-law powers and duties wholly apart from those granted by  
 21 statute.").<sup>14</sup>

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22       <sup>14</sup> Defendants also assert that there needs to be statutory authority for the Attorney General to  
 23 represent the businesses of Illinois. No citation is provided for this assertion and no reason is  
 24 offered to so limit the broad Constitutional powers of the Attorney General. However, even a  
 25 cursory reading of the Illinois Attorney General Act resolves the question. The Act authorizes  
 26 the Attorney General to "appear for and represent the people of the state." 15 Ill. Comp. Stat. §  
 205/4 (2006). Businesses are expressly included in the definition of persons. 5 Ill. Comp. Stat.  
 § 70/1.05 (2006).

Even were there not a constitutional grant of *parens* authority, the Illinois Antitrust Act grants its equivalent to the Attorney General for the representation of the state's indirect purchasers. Indeed, the Act expressly provides that only the Attorney General may represent such indirect purchasers. 740 Ill. Comp. Stat. § 10/7(2) (2006). Under Illinois law, there is a presumption that the grant of such statutory authority grants by implication the powers to wield such authority. *People ex rel. Devine v. Time Consumer Mktg., Inc.*, 336 Ill. App. 3d 74, 81, 782 N.E.2d 761, 767 (Ill. App. Ct. 2002). As a result, the courts have recognized that this statute grants the Attorney General the statutory equivalent of her common law *parens* authority. *Cardizem*, 218 F.R.D. at 521; *Lorazepam*, 205 F.R.D. at 386.

**Louisiana:** As noted above in *Board of Commissioners v. Department of Natural Resources*, 496 So.2d 281, 286 (La. 1986), a state's constitution provides limits on the otherwise plenary power of the people of a state. Louisiana's constitution recognizes a separation of powers.<sup>15</sup> It is elementary that the legal affairs of the state are matters appertaining exclusively to its chief legal officer, the Attorney General. Art. IV, §8 of the Louisiana Constitution provides:

As necessary of the assertion or protection of any right or interest of the state, the Attorney General shall have the authority (1) to institute, prosecute, or intervene in any civil action or proceeding;

The state has a quasi-sovereign interest in the economic well-being of its citizens. If the state has an interest, the Attorney General has a right to assert it in the manner in which he deems necessary. Nothing in the Louisiana Constitution, law or jurisprudence prevents him from bringing a claim on behalf of all of the states' citizens either as *parens patriae* or, as addressed below, under the Cartwright Act.

**Mississippi:** Defendants claim the Mississippi Attorney General does not have *parens*

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<sup>15</sup> La. Const. Art. II, § 2 ("Except as otherwise provided by this constitution, no one of these branches, nor any person holding office in one of them, shall exercise power belonging to either of the others.").

1 authority solely based on the lack of the words “*parens patriae*” from the Mississippi Antitrust  
 2 Act. However, this meritless claim is in complete contradiction to the courts reviewing this  
 3 issue of Mississippi constitutional law, statutory law and common law.<sup>16</sup> Defendants argument  
 4 also conflicts with consistent holdings by the Fifth Circuit Court of Appeals that hold that  
 5 statutory language need not be an express grant of *parens* authority to provide for an Attorney  
 6 General to bring an action on behalf of the state to recover *parens* damages.” *Louisiana, ex*  
 7 *rel. Ieyoub v. Borden, Inc.*, No. 94-3640, 1995 WL 59548, at \*3 (E.D. La. Feb. 10, 1995)  
 8 (citing *Texas v. Scott & Fetzer Co.*, 709 F.2d 1024 (5th Cir. 1983)). Furthermore, the  
 9 Mississippi Constitution and statutory provisions provide a solid basis for *parens* authority by  
 10 the Attorney General to represent its citizens’ economic well being. *Jim Hood, Attorney*  
 11 *General vs. Microsoft Corp.*, CA No. 3:04-cv-800WS (S.D.Miss.2004) (hereinafter  
 12 “Microsoft”).

13 The Attorney General has the authority to “institute, conduct and maintain all suits  
 14 necessary for the enforcement of the laws of the State, preservation of order and the protection  
 15 of public rights. *Gandy v. Reserve Life Ins. Co.*, 279 So. 2d 648, 649 (Miss.1973); *State ex rel.*  
 16 *Allain v. Miss. Pub. Serv. Comm’n*, 418 So. 2d 779, 781 (Miss.1982). The protection of a  
 17 competitive marketplace free from unfair and deceptive trade practices falls well within the  
 18 ambit of a “subject matter which is of statewide interest” and the “protection of public rights.”

19 Furthermore, the Attorney General has statutory authorization within the Mississippi  
 20 Antitrust Act (“MAA”) to represent Mississippi citizens who are injured by an entity’s illegal  
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22 <sup>16</sup> *Jim Hood, Attorney General v. Microsoft Corp.*, CA No. 3:04-cv-800WS (S.D. Miss. 2004)  
 23 (Attorney General, acting as *parens*, sued Microsoft for violating Mississippi Antitrust Act and  
 24 Mississippi Consumer Protection Act); *Cardizem*, 218 F.R.D. at 521 (The Attorney General  
 25 has express statutory authority to represent consumers); *In re Compact Disc Minimum*  
 26 *Advertised Price Antitrust Litigation*, No. MDL 1361, 2003 WL 21685581, at \*8 (D. Me. July  
 consumers); *Lorazepam*, 205 F.R.D. at 386 (The Mississippi Attorney General has express  
 statutory authority to represent consumers).

1       collusive activities to injure competition. In a case concerning a national conspiracy to fix  
 2       prices of baby formula, the Fifth Circuit Court of Appeals analyzed Miss. Code. Ann. § 75-21-  
 3       7 and concluded that it “. . .clearly gives the Attorney General of the State the authority to  
 4       bring suit in the name of the State for violations of Mississippi antitrust law.” *Moore ex rel.*  
 5       *Mississippi v. Abbott Labs.*, 900 F. Supp. 26, 31 (S.D. Miss. 1995) (hereinafter “*Moore*”).

6       The *Microsoft* case provides a synopsis of the Mississippi Attorney General’s well-  
 7       founded authority to bring a *parens* action of the states’ citizens for violations of its antitrust  
 8       and consumer protections laws and explains how it is applicable to the situation in the instant  
 9       case. Characteristics of a *parens* case brought by the Attorney General under his common law  
 10      authority would include one in which the state has a “‘quasi-sovereign interest’ in the litigation  
 11      to sue which is a ‘State’s interest in the well-being of its populace.’” *Microsoft* at 3 - 4 (citing  
 12      *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982)). In  
 13      applying the Attorney General’s *parens* authority to injury from violations of Mississippi’s  
 14      antitrust law, the *Microsoft* court concluded that, “the State has a quasi-sovereign interest in the  
 15      economic well-being of its citizens, *which includes securing the integrity of the marketplace.*”  
 16      *Id.* at 7 (emphasis added).

17       Finally, the Defendants surmise that the Mississippi Attorney General has no authority  
 18       to redress injury to businesses, but rather that his authority is only limited to “natural persons.”  
 19       The Defendants rely on a poor and perfunctory reading of the statutes for this significant  
 20       restriction of the Attorney General’s authority; and state that “the statutes under which  
 21       [Mississippi] purports to sue does not give the State authority to sue on behalf of businesses.”  
 22       Defendants’ motion at 14. This assertion is incorrect. Both the MAA and the Consumer  
 23       Protection Act provide the Attorney General with broad authority to bring actions on behalf of  
 24       violations of the statutes, and in no way limit such actions to “natural persons”, nor exclude  
 25       businesses.

26       As addressed above, the MAA provides a broad grant of authority to the Attorney

1 General, stating that cases for recovery of penalties for violation of antitrust laws “shall be  
 2 recovered alone in the name of the state on the relation of the Attorney General”, and that “[a]ll  
 3 enforcement proceedings of the civil features of the antitrust laws. . .shall be brought by and in  
 4 the name of the State of Mississippi upon the relation of the Attorney General.” Miss. Code  
 5 Ann. § 75-21-37. There are no limitations concerning the type of civil proceedings that he may  
 6 bring nor the type of victim for which he may recover. Rather, it is a broad granting of  
 7 authority for the Attorney General to bring proceedings for all violations of the statute and  
 8 recover for those violations.

9 Furthermore, the MAA clearly contemplates recovery for harm to Mississippi  
 10 businesses. Miss. Code. Ann. § 75-21-9 provides that “[a]ny person, natural or artificial,  
 11 injured or damaged by a trust and combine as herein defined, or by its effects direct or indirect,  
 12 may recover all damages of every kind sustained by him or it and in addition to a penalty.”  
 13 Finally, the legislative intent was that the MAA be liberally construed in all courts to the ends  
 14 that trusts and combines be suppressed and the benefits arising from competition in business  
 15 preserved to the people of this state. Miss. Code. Ann. § 75-21-29. The plain meaning of the  
 16 language of the statute and its specified legislative intent clearly provides authority both to the  
 17 Attorney General and any injured party - both “natural persons” and businesses - to bring suit  
 18 for violations of the statute.

19 Like the MAA, the Mississippi Consumer Protection Act also provides for Attorney  
 20 General-representation of businesses. Section 75-24-9 provides:

21 “[W]henever the Attorney General has reason to believe that any person  
 22 is using, has used, or is about to use any method, act or practice  
 23 prohibited by [the Act] and that proceedings would be in the public  
 24 interest, he may bring an action in the name of the state against such  
 person to restrain by temporary or permanent injunction the use of such  
 method, act or practice.”

25 Miss. Code. Ann. § 75-24-9. Then, in Section 75-24-11, the Act explicitly provides that “the  
 26 Court may make such additional orders or judgments, including restitution, as may be

1 necessary to *restore to any person in interest* any monies or property, real or personal, which  
 2 may have been acquired by means of any practice prohibited by this chapter..." *Id.* § 75-24-11.  
 3 The statute defines persons as "natural persons, corporations, trusts, partnerships, incorporated  
 4 and unincorporated associations, and any other legal entity." *Id.* § 75-24-3(a) (emphasis  
 5 added). When these sections are read together, the plain meaning of the statute obviously  
 6 grants the Attorney General with authority to sue for violations of the Act and ask for  
 7 restitution on behalf of businesses. Accordingly, the Defendants' Motion to Dismiss as to  
 8 Mississippi should be denied.

9       **New Hampshire:** Defendants assert that a specific grant of *parens* authority is  
 10 required before New Hampshire may bring an action pursuant to that doctrine. In support of  
 11 this claim, Defendants rely on the *California v. Frito-Lay, Inc.*, 74 F.2d 774 (9th Cir. 1973).  
 12 The case cited is inapposite, is not controlling, and is contrary to New Hampshire Supreme  
 13 Court. Rather, under New Hampshire law, before it can exercise its *parens* authority, the State  
 14 must establish two criteria: first, that the State seeks to protect a "quasi-sovereign" interest, and  
 15 second, that a substantial segment of the population is threatened by the challenged conduct.  
 16 *State v. City of Dover*, 153 N.H. 181, 186-87 (2006) (citing *Alfred L. Snapp & Son*, 458 U.S. at  
 17 607).

18       To elaborate, New Hampshire law explicitly recognizes *parens* authority when the  
 19 State acts to protect "quasi-sovereign" interests. Among such interests, the New Hampshire  
 20 Supreme Court has explicitly identified the "general economy of the state." *City of Dover*, 153  
 21 N.H. at 186 (citing *Bull v. HN Info. Sys.*, 16 F. Supp. 2d 90, 96 (D. Mass. 1998)).

22       Furthermore, the New Hampshire Supreme Court has held that the State has a quasi-  
 23 sovereign interest in protecting the economic health of its residents as well as that of the State.  
 24 ("[T]he State has a quasi-sovereign interest in protecting the health and well-being, both  
 25 physical and economic, of its residents..."). *Id.* In this matter, the State of New Hampshire  
 26 seeks to ensure that a free market characterized by robust competition exists in the State, as

1 such is necessary for the economic health of the State and its residents. Thus, the State has  
 2 entered into this action to protect its quasi-sovereign interests, and the first prong of the *City of*  
 3 *Dover* test is met.

4 Under New Hampshire law, the State must also show that a “sufficiently substantial  
 5 segment of the population is affected by the challenged conduct.” *Id.* at 187 (citing *Bull HN*  
 6 *Info. Sys.*, 16 F. Supp. 2d at 98). While avoiding a strict numerical threshold for this  
 7 calculation, the New Hampshire Supreme Court held that the State needs to be more than  
 8 merely a nominal party and do more than simply identify a group of residents who were  
 9 harmed. However, the State may show, and the Court must consider, the indirect effects of the  
 10 injury when determining the magnitude of injury to the population of the State. *Id.* (citing  
 11 *Alfred L. Snapp & Son, Inc.*, 458 U.S. at 607).

12 Defendants claim that since the State of New Hampshire may not sue in the name of  
 13 indirect purchasers under its Combinations and Monopolies Act, it may not exercise its *parens*  
 14 authority to protect indirect purchasers from violations of that Act. This is wrong for two  
 15 reasons. First, New Hampshire seeks, through its *parens* action, to restore a competitive  
 16 marketplace for DRAM products. N.H. Const. Pt. 2, Art. 83 (“Free and fair competition in the  
 17 trades and industries is an inherent and essential right of the people and should be protected  
 18 against all monopolies and conspiracies which tend to hinder or destroy it.”); *see also McIntire*  
 19 *v. Borofsky*, 95 N.H. 174, 178 (1948). Furthermore, to the extent direct purchasers in New  
 20 Hampshire were harmed by the defendant’s actions, New Hampshire’s *parens* claim should  
 21 stand.

22 **New Mexico:** New Mexico’s Attorney General relies on the powers granted to her by  
 23 the Legislature. Defendants fail to consider the Legislature’s grant of authority. The broad  
 24 authority bestowed upon the Attorney General is set forth in N.M. Stat § 8-5-2 (1978), in two  
 25 subsections, providing that the Attorney General shall:

(B) prosecute and defend in any other court or tribunal all actions and proceedings, civil or criminal, in which the state may be a party or interested when, in [her] judgment, the interest of the state requires such action.

(C) appear before local, state and federal courts . . . to represent and to be heard on behalf of the state when, in [her] judgment, the public interest of the state requires such action.

U.S. District Court Judge Burciaga considered these two sections in *New Mexico v. Scott & Fetzer Co.*, No. 81-054-JB, 1981 WL 2167, 1981-2 Trade Cases P 64, 439 (D.N.M. 1981). He noted that the legislature neither included nor excluded *parens*. It observed that:

The statutes authorize suits in the name of the State. This action is brought in the name of the State, and nothing in the statutes indicate that the fact that the State is suing on behalf of others renders such a suit beyond the pale of the Attorney General's statutory authority. Such a reading of the statutes would mean that the Attorney General could never bring or defend a suit in the State's name on behalf of others. This result could not have been what the New Mexico legislature intended.

*Id.* at \*2.

Judge Burciaga also considered the *parens* authority granted in the Clayton Act, 15 U.S.C.A. § 15h, and determined that “[t]he New Mexico legislature has not acted to deprive the Attorney General of this authority. This indicates that the legislature has no objection to the exercise of this authority.” *Id.* Other courts have since accepted the *parens* authority of New Mexico’s Attorney General. *Lorazepam*, 205 F.R.D. at 369 (D.D.C. 2002); *Relafen*, 221 F.R.D. 260 (D. Mass. 2004); *see also* Kevin J. O’Connor, *Is the Illinois Brick Wall Crumbling?*, 15 Antitrust 34, 36 & nn.21-22 (2001). The Attorney General may represent the citizens of New Mexico.

**North Dakota:** North Dakota has long recognized that the Attorney General, acting on behalf of the State, has broad authority, independent of statute, to institute legal proceedings to protect the public interest and the general welfare of the people of the State. *State ex rel. Burgum v. Hooker*, 87 N.W.2d 337 (N.D. 1957). In *Hooker*, the Attorney General, on behalf of the State of North Dakota, brought an action to enjoin the Defendants from conducting a usurious, small loan business. *Id.* at 339. The Defendants argued the State did not have

1 authority to bring an action on behalf of citizens of the State. The court rejected that argument  
 2 and explained: “It has been repeatedly held that the state has the right, independent of any  
 3 statutory provision, to institute a suit in any of its courts when it is required for the general  
 4 welfare of its people. ‘It possesses this right both in its sovereign capacity and by virtue of its  
 5 corporate rights.’” *Hooker*, 87 N.W.2d at 340 (citations omitted). More recently, in *State v.*  
 6 *Haggerty*, 580 N.W.2d 139, 147 (N.D. 1998), the North Dakota Supreme Court stated: “Not  
 7 every aspect of the powers of a constitutional officer like the Attorney General may be  
 8 conveniently spelled out by statute, and the Legislature has not attempted to do so.” As such,  
 9 contrary to Defendants’ argument, the statutes under which North Dakota brings this action  
 10 need not include a specific legislative grant of *parens* authority for the Attorney General to  
 11 represent North Dakota citizens. As the Court in *Haggerty* said:

12 “[T]he legislature has no constitutional power to abridge the inherent powers of  
 13 the Attorney General despite the fact that the constitution provides that the  
 14 ‘duties of the \* \* \* Attorney General \* \* \* shall be as prescribed by law.’  
 15 (Const.Sec.83); *State v. Erickson*, 72 N.D. 417, 422, 7 N.W.2d 865, 867 (1943).  
 16 The Legislature may not strip officers “‘imbedded in the Constitution’ of a  
 17 portion of their inherent functions.”

18 *Ex parte Corliss*, 16 N.D. 470, 476-77, 114 N.W. 962, 965 (1907) (quoting *State ex rel.*  
 19 *Fausey v. Harris*, 1 N.D. 190, 194, 45 N.W. 1101, 1102 (1890)). *Haggerty*, 580 N.W.2d at  
 20 146-47. Defendants’ motion to dismiss as to the state of North Dakota should be denied.

21 **Pennsylvania:** Not only does the Pennsylvania Attorney General have the authority to  
 22 represent the Commonwealth and its citizens in any action brought for the violation of the  
 23 antitrust laws of the United States and the Commonwealth, it may also do so under common  
 24 law. In addition, as further described below, the California Cartwright Act allows for actions  
 25 to be filed by out-of-state governmental entities and there is no statute that prohibits the  
 26 Pennsylvania Attorney General from doing so.

27 **South Carolina:** Defendants contend that the Attorney General of South Carolina’s  
 28 claims on behalf of the state, its agencies and consumers should be dismissed because (a) the

1 Attorney General is not authorized to sue as *parens* on behalf of natural persons, (b) the South  
 2 Carolina Attorney General is not authorized to bring a *parens* action claim under California  
 3 Cartwright Act, and if so, the Attorney General cannot collect damages; and (c) the Attorney  
 4 General is not authorized to bring a *parens* claim for damages, citing South Carolina antitrust  
 5 law. The Defendants' motion to dismiss should be denied. Defendants' *parens* arguments will  
 6 be addressed here and their Cartwright Act argument will be addressed *infra*.

7 The South Carolina Supreme Court recently stated that “[a]s the chief law officer of the  
 8 State, [the Attorney General] may, in the absence of some express legislative restriction to the  
 9 contrary, exercise all such *power and authority as public interests may from time to time  
 require*, and may institute, conduct and maintain all such suits and *proceedings as he deems  
 necessary for the enforcement of the laws of the State, the preservation of order, and the  
 protection of public rights.*” *Condon v. Hedges*, 349 S.C. 232, 239, 562 S.E.2d 623,627 (2002)  
 13 (citing *State ex rel. Daniel v. Broad River Power Co.*, 157 S.C. 1, 68, 153 S.E. 537, 560  
 14 (1929), *aff'd*, 282 U.S. 187 (1930) (citation omitted and italics added by *Daniel* court)). The  
 15 United States District Court in *Cardizem* cited the *Condon v. Hedges* case as an interpretation  
 16 by our state court that the South Carolina Attorney General possesses *parens* authority, or its  
 17 functional equivalent, as a matter of common law. *Cardizem*, 218 F.R.D. at 521.

18 Additionally, the SCUTPA provides the Attorney General with *parens* authority in a  
 19 statutory context by allowing the Attorney General to initiate proceedings that are in the public  
 20 interest, and, further to request that the court issue orders or judgments that may be necessary  
 21 to restore any *person* who has suffered any ascertainable loss of monies or real or personal  
 22 property that have been acquired by means or practices that are in violation of SCUTPA. *See*  
 23 S.C. Code Ann. § 39-5-50. Section 39-5-10 of SCUTPA defines “*person*” as follows:  
 24 “‘Person’ shall include natural persons, corporations, trusts, partnerships, incorporated or  
 25 unincorporated associations and any other legal entity.” S.C. Code Ann. § 39-5-10(a).

26 Further, Defendants contend by citing a provision of the South Carolina's antitrust

1 laws, specifically S.C. Code Ann. § 39-3-190, that the South Carolina laws do not authorize the  
 2 Attorney General to bring *parens* claims for damages allegedly sustained by its state residents  
 3 and otherwise would limit the types of antitrust enforcement of our state antitrust laws. South  
 4 Carolina is not proceeding in this action pursuant to its state antitrust laws, but pursuant to its  
 5 common law *parens* authority, *see Condon*, 349 S.C. at 232, 562 S.E.2d at 623, and its  
 6 statutory *parens* authority as set forth in SCUTPA. The United States District Court in South  
 7 Carolina has interpreted our antitrust laws to be limited to intrastate activity while SCUTPA is  
 8 not limited to in-state conduct. *See Cheshire v. Coca-Cola Bottling Affiliated, Inc.*, 758 F.  
 9 Supp. 1098 (D.S.C. 1990).

10       **Tennessee:** Defendants' contention that Tennessee has no authority to bring a *parens*  
 11 action is without merit. The Attorney General of Tennessee is a constitutional officer, 1870  
 12 Tenn. Const. Art. VI, § 5, with duties and powers also set forth by statute, Tenn. Code Ann. §  
 13 8-6-109, and all common law powers of an Attorney General. *State v. Heath*, 806 S.W.2d 535,  
 14 537 (Tenn. Ct. App. 1990); *see also State ex rel. Inman v. Brock*, 622 S.W.2d 36, 41 (Tenn.  
 15 1981) ("A broad discretion is vested in this officer in determining what matters may . . . be of  
 16 interest to the people . . . the office of Attorney General is ancient in its origin . . . has a wide  
 17 range of powers at common law . . . in addition to his statutory powers.")

18       Tennessee's public policy against anticompetitive behavior is in its Constitution and,  
 19 since 1891, in the Tennessee Trade Practices Act, Tenn. Code Ann. § 47-25-101 *et seq.*  
 20 ("TTPA"). Tennessee courts have held that the Attorney General has implied authority to  
 21 investigate violations of the Act, even though not mentioned expressly. *State ex rel. Shriver v.*  
 22 *Leech*, 612 S.W.2d 454, 457 (Tenn. 1981). Tennessee's clear public policy against  
 23 anticompetitive behavior and the implied power to investigate require a conclusion that its  
 24 Attorney General has authority to bring a *parens* action to vindicate the public interest  
 25 including seeking disgorgement of ill-gotten gain. That neither the constitution nor the TTPA  
 26 specifically refers to "*parens patriae*" authority does not limit this authority because the words

“*parens patriae*” are not used in statutes granting such authority to state officials.<sup>17</sup> Federal district courts have also recognized the Tennessee Attorney General’s authority to bring a *parens* action on behalf of Tennessee consumers under the TTPA.<sup>18</sup>

**Wisconsin:** The Attorney General of Wisconsin alleges its claims on behalf of consumers pursuant to Wis. Stat. §§ 133.16-133.17, which grant the Wisconsin Attorney General broad authority to prosecute antitrust cases. Generally, the Wisconsin Attorney General has no authority to prosecute litigation on behalf of Wisconsin citizens unless a statute grants such authority. *State v. City of Oak Creek*, 605 N.W.2d 526, 533 (Wis. 2000). The Wisconsin antitrust statute, however, specifically empowers the Wisconsin Attorney General to prosecute any and all violations of state antitrust law, regardless of who the victims of these violations may be. *See* Wis. Stat. § 133.17 (conferring authority upon the Attorney General to “institute, manage, control and direct . . . all prosecutions for violations of [the Wisconsin antitrust statute]”). The broad powers conferred by the Wisconsin legislature authorize the Attorney General to seek redress for consumers harmed by a violation of the Wisconsin antitrust statute, as the Complaint alleges here. *See Lorazepam*, 205 F.R.D. at 386 (“Wisconsin. . .ha[s] express statutory authority to represent consumers in a capacity which is the functional equivalent of *parens patriae*.”). Defendants’ motion to dismiss as to Wisconsin should be denied.

#### IV. THE MISSISSIPPI, TENNESSE, WISCONSIN, MARYLAND AND ILLINOIS STATUTES APPLY TO ACTIVITIES IN INTERSTATE, AS WELL AS INTRASTATE, COMMERCE

Defendants contend that claims by certain states fail to allege the required “intrastate” component because the Complaint states, “Defendants and their co-conspirators engaged in the

<sup>17</sup> E.g., statutes governing children are recognized as vesting juvenile courts with *parens* authority. *Lokey v. Griffin*, 45 Tenn. App. 236, 322 S.W.2d 239 (Tenn. Ct. App. 1958).

<sup>18</sup> *Cardizem*, 218 F.R.D. at 508; *Lorazepam*, 205 F.R.D. at 386 (recognizing that *Heath*, 806 S.W.2d 535, suggests that the Attorney General has authority to bring a *parens* action under the TTPA). *But see Mylan*, 62 F. Supp. 2d at 51.

1 business of marketing and selling DRAM *throughout the United States.*” Defendants’ Brief at  
 2 pg. 25 (emphasis added.) However, all of the challenged states allow claims for antitrust  
 3 activity occurring outside their state boundaries.

4 **Mississippi:** The Mississippi Antitrust Act, a broad statute encompassing interstate  
 5 actions, has been applied many times to nationwide conspiracies. *See Moore*, 900 F. Supp. at  
 6 32; *Canadian Export*, 350 F. Supp. 2d at 171. As explained in *Moore* and *Canadian Export*,  
 7 there is no Supreme Court case holding that Mississippi’s Act is solely applicable to intrastate  
 8 issues. In fact, in *Canadian Export*, the court notes “[b]oth sides point to Standard Oil. . . in  
 9 support of their respective positions . . . .” 350 F. Supp. 2d at 171. The *Microsoft* case cited by  
 10 Defendants also acknowledges that the Supreme Court has not ruled that “Mississippi antitrust  
 11 law is limited to intrastate conspiracies.” *In re Microsoft Corp. Antitrust Litig.*, MDL No.  
 12 1332, 2003 WL 22070561, at \*2, n.4, 2003-2 Trade Cases P 74,138 (D.Md. Aug.22, 2003).

13 Defendants’ reliance on *Standard Oil Co. v. State ex. rel. Attorney General*, 65 So. 468  
 14 (Miss. 1914) is misplaced. In that case, the court describes sales and distribution within  
 15 Mississippi as intrastate in character when made “after the. . .products [have] been received. .  
 16 .in this state and . . . incorporated into the general mass of property therein.” *Standard Oil*, 65  
 17 So. at 470. Applying *Standard Oil*, the *Canadian Export* court also found goods imported into  
 18 Mississippi to be intrastate in character because some sales of the end product would occur  
 19 wholly within Mississippi, after the end product had been “incorporated into the general mass  
 20 of property” in the state, thereby falling within the compass of the Mississippi antitrust  
 21 statute.” *Canadian Export*, 350 F. Supp. at 171.

22 **Tennessee:** Defendants mistakenly rely on *Freeman Ind., LLC v. Eastman Chem. Co.*,  
 23 172 S.W.3d 512 (Tenn. 2005). In *Freeman*, the Tennessee Supreme Court held that indirect  
 24 purchasers, including out of state indirect purchasers, may sue under the TTPA. *Id.* at 520.  
 25 “According to its plain language, the TTPA prohibits arrangements that decrease competition  
 26 or affect the prices of goods even if those goods arrived in Tennessee through interstate

1 commerce. The act does not contain any language indicating that the legislature intended that  
 2 the scope of the act be limited to intrastate commerce.” *Id.* at 522. The Court specifically  
 3 refused to apply any standard focusing on anticompetitive *conduct*, instead placing the focus  
 4 on the “*effect* of the anticompetitive conduct on Tennessee trade or commerce” to determine  
 5 applicability. *Id.* Thus, Tennessee is not required to allege any anticompetitive conduct taking  
 6 place in the State of Tennessee.

7 The Court then considered the proper impact to support a claim under the TTPA,  
 8 holding that the appropriate standard is whether “the alleged anticompetitive conduct affects  
 9 Tennessee trade or commerce to a substantial degree.” *Id.* at 523. Only then did the Court  
 10 look to see if the plaintiff had stated a claim. *Freeman* is easily distinguished from this case.  
 11 The plaintiff was **not** a Tennessee citizen or consumer but a New York corporation that was an  
 12 “end-user of food products containing sorbates and purchases these products at supermarkets in  
 13 New York”. *Id. at 516.* There was no proof that the sorbates contained in the products  
 14 purchased by the plaintiff in New York were manufactured by the lone Tennessee defendant  
 15 corporation. *Id. at 524.* The significance of *Freeman* is the fact that Freeman paid higher  
 16 prices *in New York* did not establish an impact on Tennessee’s economy sufficient to survive  
 17 summary judgment. In fact, the Court notes,

18       The determination of whether an effect is substantial does not involve  
 19       “mathematical nicety.” Rather, the test is pragmatic, turning upon the  
 20       particular facts of the case. The anticompetitive conduct, however, need  
 21       not threaten the demise of Tennessee businesses or affect market prices  
 22       to substantially affect intrastate commerce.

23       *Id.* at 523-24.(internal citations omitted). In addition, the TTPA itself makes clear that paying  
 24       higher prices is itself an injury under the TTPA. Tenn. Code Ann. § 47-25-101. The  
 25       Complaint in this action alleges that consumers in every state paid higher prices for DRAM  
 26       and DRAM-containing goods than they would have paid absent the price-fixing agreements.  
 27       This clearly establishes a claim under the TTPA.

28       **Wisconsin:** The Defendants claim that Wisconsin law requires plaintiffs to allege

1 particularized conduct and effects within Wisconsin to allege jurisdiction under the Wisconsin  
 2 antitrust statute. The Wisconsin Supreme Court has held to the contrary. *Olstad v. Microsoft*  
 3 Corp., 700 N.W.2d 139, 158 (Wis. 2005). In *Olstad*, the Wisconsin Supreme Court held that a  
 4 plaintiff may allege a claim based entirely on conduct occurring outside Wisconsin, so long as  
 5 the plaintiff alleges that the conduct “substantially affects” Wisconsin. *See id.* The Court  
 6 never implied that the plaintiff must further allege that these effects were somehow specially  
 7 focused on Wisconsin as compared to other states. *See id.*

8 Wisconsin law requires courts to interpret the Wisconsin antitrust statute with “the most  
 9 liberal construction to achieve the aim of competition.” Wis. Stat. § 133.01. Only two  
 10 reported Wisconsin Court of Appeals cases have interpreted the *Olstad* holding in light of this  
 11 legislative command. *See Meyers v. Bayer AG*, 718 N.W.2d 251, 254, *petition for review*  
 12 *granted* (July 25, 2006) (No. 2003AP2840); *Szukalski v. Crompton Corp.*, 2006 WI App 195,  
 13 No. 2003AP3132, 2006 WL 2729665 (Wis. Ct. App. Sept. 26, 2006). The Defendants cite the  
 14 *Szukalski* case, but omit any reference to the *Meyers* case, which is currently on appeal to the  
 15 Wisconsin Supreme Court and is contrary to the Defendants’ position.

16 In *Meyers*, the Wisconsin Court of Appeals held that a class of indirect purchasers  
 17 adequately alleged a claim under the Wisconsin antitrust statute when they pleaded that the  
 18 drug manufacturers’ conduct (all of which occurred outside of Wisconsin) caused plaintiffs to  
 19 pay higher prices for products they purchased in Wisconsin. *Meyers*, 718 N.W.2d at 256. The  
 20 plaintiffs made no claim that the effect on prices in Wisconsin was somehow different than the  
 21 effect on prices across the nation. The court noted that the “people of Wisconsin are  
 22 substantially affected if the price of a product is fixed as a result of illegal practices.” *Id.* at  
 23 255-56. The court further noted that Wisconsin residents who purchased the product “were  
 24 forced to pay increased prices and this caused an economic loss to the class members” and that  
 25 no more specific allegation was necessary. *Id.* at 256.

26 In contrast, the standard articulated in the *Szukalski* case cited by the Defendants,

1 attempts to compare the harm allegedly caused in Wisconsin with the harm caused elsewhere.  
 2 *Szukalski*, 2006 WI App 195 at ¶ 24. In *Olstad*, however, the Wisconsin Supreme Court  
 3 focused solely on the harm caused in Wisconsin. *Olstad*, 700 N.W.2d at 158. Harm that the  
 4 defendants also may have caused in other states was simply not part of the analysis, nor should  
 5 it have been. *See id.*

6 Yet the Defendants argue that Wisconsin should have to plead some sort of special  
 7 injury compared to other states. *See, e.g.*, Defendants' Motion at 16 (arguing that effects in  
 8 Wisconsin must be different than national effects). Under this approach, a defendant that  
 9 focuses its harm in Wisconsin would be subject to treble damages under Wisconsin law, while  
 10 the same defendant causing equal (or even greater) harm in Wisconsin would be immune from  
 11 suit under Wisconsin law so long as the defendant also caused widespread harm across the  
 12 country. That result is illogical and the Court should reject it.

13 Understandably, the reasoning employed by the Defendants is found nowhere in the  
 14 *Olstad* opinion. Moreover, the analysis contravenes the language of the Wisconsin antitrust  
 15 statute itself, which directs courts to interpret the statute as broadly as possible. *See* Wis. Stat.  
 16 § 133.01. Accordingly, the Court should reject the Defendants' analysis and follow instead the  
 17 clear command of the Wisconsin Supreme Court in *Olstad*. *See Comm'r of Internal Revenue*  
 18 v. *Estate of Bosch*, 387 U.S. 456 (1967) (even in a non-diversity case, federal court should  
 19 follow "state law as announced by the highest court of the State").

20 All that *Olstad* requires is that the State of Wisconsin allege that Defendants' conduct  
 21 "substantially affected" Wisconsin. *Olstad*, 700 N.W.2d at 158. The Complaint alleges that as  
 22 a result of Defendants' price-fixing conspiracy consumers in Wisconsin (and elsewhere) have  
 23 paid more for DRAM purchased from the Defendants. The complaint further alleges that  
 24 "[t]hese violations substantially affected the people of Wisconsin and had impacts within the  
 25 State of Wisconsin." Compl. ¶ 176. Plainly, these allegations are sufficient to assert  
 26 jurisdiction under *Olstad*.

1       **Maryland:** The MATA states that in determining whether a violation has occurred,  
 2 “the relevant market or effective area of competition may *not be limited by the boundaries of*  
 3 *the State.*” Md. Code Ann. Com. Law § 11-202(a)(3) (emphasis added). MATA is to be  
 4 “liberally construed to serve its beneficial purposes.” Md. Code Ann. Com. Law §11-202(b).  
 5 From its inception MATA has been interpreted to assert jurisdiction over activities in interstate  
 6 commerce. *See W. Reynolds & J. Wright, A Practitioner’s Guide to the Maryland Antitrust*  
 7 *Act*, 36 Md. L. Rev. 323, 340 (1976).

8       Heeding these statutory admonitions, in *Maryland v. Philip Morris, Inc.*, 1997 WL  
 9 540913 (Md. Cir. Ct. May 21, 1997) the court found that an antitrust count was properly filed  
 10 against nineteen multinational tobacco companies and others to recover money expended by  
 11 the State through its Medicaid program to treat its citizens for smoking-related illnesses. After  
 12 quoting MATA § 11-202 (a), the court stated that the action was “consistent with the broad  
 13 purpose set forth by the statute, as liberally construed pursuant to the requirements of the  
 14 General Assembly.” *Id.* at \*19; *cf. Feldman*, 210 F. Supp. 2d at 294; *Maryland v. Philip*  
 15 *Morris Inc.*, 934 F. Supp. 173 (D. Md. 1996). Here, ¶ 29 of the Complaint, alleging  
 16 “marketing and selling DRAM throughout the United States” sufficiently expresses a nexus  
 17 with commerce in Maryland to assert jurisdiction under MATA.

18       **Illinois:** Defendants assert that “[c]ourts have consistently held that Illinois’s antitrust  
 19 laws apply only to intrastate commerce and do not apply to interstate commerce,” citing two  
 20 cases dating from the 1950’s and 1960’s. What they fail to tell this Court is that after those  
 21 cases were decided, the Illinois legislature amended the Illinois Antitrust Act (“IAA”) in 1969  
 22 to address this very issue. Since then the statute has provided, “No action under this Act shall  
 23 be barred on the grounds that the activities or conduct complained of in any way affects or  
 24 involves interstate or foreign commerce.” 740 Ill. Comp. Stat. § 10/7.9 (2006). This  
 25 amendment put to rest any question as to the IAA’s applicability to acts that occur in interstate  
 26 or foreign commerce. For example, Illinois courts have allowed a claim of a multi-state

1 conspiracy, noting that “[p]rice increases in a market which encompasses part of Illinois are a  
 2 sufficiently substantial effect on Illinois commerce for [the plaintiff] to seek relief under the  
 3 Illinois Antitrust Act.” *Mr. Frank, Inc. v. Waste Mgmt., Inc.*, 591 F. Supp. 859, 869 (N.D. Ill.  
 4 1984). A federal district court held that the IAA encompassed a national conspiracy, holding  
 5 that it is “not limited to the geographical boundaries of the State of Illinois.” *Lorazepam*, 295  
 6 F. Supp. 2d at 48.

7 **V. TEXAS LAW PERMITS DISGORGEMENT, RESTITUTION AND DAMAGES**

8 Section 15.21(b) of the Texas Free Enterprise and Antitrust Act of 1983 grants the  
 9 statutory authority to issue an injunction and, necessarily with it, the full range of equitable  
 10 remedies, including the power to grant restitution and compel disgorgement of damages. Tex.  
 11 Bus. & Com. Code § 15.21(b). The statute is a non-exclusive grant of judicial authority: “In  
 12 any such suit, the court shall apply the same principles as those generally applied by courts of  
 13 equity in suits for injunctive relief against threatened conduct that would cause injury to  
 14 business or property.” *Id.* Case law dictates that this intent be read broadly to include  
 15 disgorgement and restitution, as well as injunctive relief.

16 As the United States Supreme Court has made clear:

17 [An order for recovery and restitution] may be considered as an  
 18 equitable adjunct to an injunction decree. Nothing is more clearly part  
 19 of the subject matter of a suit for injunction than the recovery of that  
 which has been illegally acquired and which has given rise to the  
 necessity for injunctive relief.

20 *Porter*, 328 U.S. at 399. The 11<sup>th</sup> Circuit has more recently affirmed this ruling: “As *Porter*  
 21 makes plain, absent a clear command to the contrary, the district court’s equitable powers are  
 22 extensive. Among the equitable powers of a court is the power to grant restitution and  
 23 disgorgement.” *FTC v. Gem Merch.*, 87 F.3d 466, 469 (11th Cir. 1996). The Court in *Porter*  
 24 further held that these broad powers remain intact unless there is a statute that specifically or  
 25 inferentially restricts the court’s jurisdiction in equity:

26 The comprehensiveness of this equitable jurisdiction is not to be denied

1 or limited in the absence of a clear and valid legislative command.  
 2 Unless a statute in so many words or by a necessary and inescapable  
 3 inference restricts the court's jurisdiction in equity, the full scope of that  
 4 jurisdiction is to be recognized and applied. The great principles of  
 5 equity, securing complete justice, should not be yielded to light  
 6 inferences or doubtful construction.

7 *Porter*, 328 U.S. at 398. The Supreme Court of Texas has from the earliest days of statehood  
 8 held that the courts should use the jurisdiction of equity "to furnish a plain, complete and  
 9 adequate remedy." *Grassmeyer v. Beeson*, 18 Tex. 753, 1857 WL 5028, at \*9 (1875).  
 10 Therefore, a statute encompassing injunctive relief, and not expressly addressing other types of  
 11 equitable relief, is presumed to authorize all inherent equitable powers to formulate a complete  
 12 remedy. And since section 15.21(b) textually expands the court's authority from simply  
 13 issuing an injunction to the broader authority to issue relief "generally applied by courts of  
 14 equity," the statute does not necessarily exclude the availability of restitution or disgorgement.  
 15 Tex. Bus. & Com. § 15.21(b), *see also* Tex. Rev. Civ. Stat. art. 581-32(c) (2006) (Texas  
 16 Securities Act recognizes that injunctive relief incorporates restitution as an equitable remedy).

17 Lastly, when the public interest is involved in a matter, such as in this case, the court's  
 18 equitable powers assume an even broader and more flexible character than when only a private  
 19 controversy is at stake. *See Campbell v. McGruder*, 580 F.2d 521, 543 (D.C. Cir. 1976) ("It is  
 20 a familiar doctrine that the extent to which a court of equity may grant or withhold its aid, and  
 21 in the manner of molding its remedies, may be affected by the public interest involved."); *U.S. v. Exxon Corp.*, 561 F. Supp. 816, 856-857 (D.D.C. 1983) (Court interpreted an environmental  
 22 pollution statute to order disgorgement "in the exercise of its broad equitable powers to order  
 23 restitution").

**VI. STATE ATTORNEYS GENERAL MAY BRING CLAIMS UNDER THE CALIFORNIA CARTWRIGHT ACT.**

24 State Attorneys General may bring *parens* clams, class action claims and other  
 25 representational claims under the Cartwright Act as long as their own state laws do not  
 26 mandate otherwise.

1                   **A. California's Cartwright Act Allows State Attorneys General to File *Parens*  
2 Actions on Behalf of Out-of-State Citizens**

3                   State Attorneys General can bring *parens* claims on behalf of their citizens under the  
4 Cartwright Act as long as their own state laws do not forbid them from doing so. California  
5 generally allows out-of-state residents to file class action/single lawsuits in California courts  
6 asserting California claims. Moreover, section 16750(a) provides that "any person" may bring  
7 a claim under the Cartwright Act. Nowhere does the Cartwright Act purport to limit the  
8 procedural devices by which that person may bring his or her claim; for example, that person  
9 may bring a class action even though the Cartwright Act itself contains no provisions providing  
10 for class actions. *See Bruno v. Superior Court*, 127 Cal. App. 3d 120, 134-35 (Cal. Ct. App.  
11 1981). There, the state appellate court rejected the notion that section 16760(a)(1) operated to  
12 preclude class actions, reasoning that there were no indicia of legislative intent that this section  
13 was to have exclusionary effect. *Id.* (discussing fluid recovery via class action); *see also State*  
14 *v. Levi Strauss*, 41 Cal. 3d 460, 478 (1986). By analogy, nothing in section 16760(a)(1)  
15 indicates that *parens* actions, as opposed to *class* actions, are precluded.

16                  Further, just as *Pacific Gas & Electric Co. v. County of Stanislaus*, 16 Cal. 4th 1143,  
17 1153 (1997), suggests that other State Attorneys General may represent out-of-state  
18 government agencies, that case also suggests that other State Attorneys General can bring  
19 actions on behalf of natural persons from their States.

20                  California Business & Professions Code section 16760(f) states that "[t]he powers of  
21 this section are in addition to and not in derogation of the powers granted to the Attorney  
22 General by common law with respect to bringing actions *parens patriae*." Cal. Bus. & Prof.  
23 Code § 16760. Nothing about this subdivision suggests that the California Legislature  
24 intended to, or did, exclude common law *parens* actions by other State Attorneys General.

25                  Finally, section 16750(e) of the Cartwright Act constitutes a recognition by the  
26 California Legislature that sister States may bring *parens* claims under that Act on behalf of

1 their own natural persons, just as the California Attorney General may bring *parens* claims  
 2 under that Act on behalf of California's natural persons, that may need to be pooled together.  
 3 Consequently, Defendants' Motion to Dismiss as to the out-of-state *parens* claims brought  
 4 under the Cartwright Act should be denied.

5           **B. Out-of-State Government Entities Are "Persons" Entitled to Assert Claims**  
 6           **Under the Cartwright Act**

7           The Cartwright Act allows the State Attorneys General to file actions on behalf of out-  
 8 of-state governmental entities. California allows out-of-state residents to file class action/single  
 9 lawsuits in California courts asserting California claims as long as there is a sufficient nexus to  
 10 the State, e.g., as long as a substantial amount of injury-producing conduct occurred in  
 11 California.<sup>19</sup> Here, Defendants' motion does not challenge the nexus with the State of  
 12 California.

13           Out-of-state governmental agencies are "persons" under section 16750 (a) and treated  
 14 the same as out-of-state residents. Section 16750(a) provides:

15           Any *person* who is injured in his or her business or property by reason of anything  
 16 forbidden or declared unlawful by this chapter, may sue therefore in any court having  
 17 jurisdiction in the county where the defendant resides or is found, or any agent resides  
 18 or is found, or where service may be obtained regardless of whether such injured  
 19 person dealt directly or indirectly with the defendant."

20           Cal. Bus. & Prof. Code § 16750(a) (emphasis added.). California treats out-of-state  
 21 government plaintiffs exactly as it does any other plaintiff in granting them the right to sue  
 22 where a statute refers to a "person" or "persons."<sup>20</sup>

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23           <sup>19</sup> See, e.g., *Diamond Multimedia Sys., Inc. v. Superior Court*, 19 Cal. 4th 1036, 1059-60,  
 24 1062-65 (1999); *NW Mortgage, Inc. v. Superior Court*, 72 Cal. App. 4th 214, 225-27 & n.17  
 25 (Cal. Ct. App. 1999); *J.P. Morgan v. Superior Court*, 113 Cal. App. 4th 195, 221 (Cal. Ct.  
 26 App. 2003); *Wershba v. Apple Computers, Inc.*, 91 Cal. App. 4th 224, 241-44 (Cal. Ct. App.  
 2001).

20           <sup>20</sup> See *FTC v. MTK Mktg. Inc.*, 149 F.3d 1036, 1039-40 (9th Cir. 1998) (FTC had standing as a  
 21 plaintiff to enforce California's bond requirement for telephonic sellers where Cal. Bus. &  
 22 Prof. Code § 17511.12(c)(2) granted such standing to the "Attorney General, district attorney,

1       California views the Sherman Act as being helpful when interpreting the reach and  
 2 scope of the Cartwright Act. *See, e.g., State v. Texaco*, 46 Cal. 3d 1147, 1164 (1988). Similar  
 3 Sherman Act language has universally been held to include state agencies and political  
 4 subdivisions.<sup>21</sup> *See, e.g., Georgia v. Evans*, 316 U.S. 159 (1942) (a state is a person);  
 5 *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U.S. 390, 396 (1906) (political  
 6 subdivision is a person). In *Pfizer, Inc. v. Government of India*, 434 U.S. 308 (1978), the  
 7 Supreme Court concluded the language in the Sherman Act that allowed “a *person* injured in  
 8 his business or property” to “sue therefore in any district court of the United States”  
 9 encompassed *foreign governments just as it had previously found that it encompassed state*  
 10 *governments*. Thus, the Cartwright Act’s definition of “person” includes out-of-state  
 11 government agencies.

12       California, as a rule of statutory construction, interprets the term “person” as including  
 13 government agencies *unless* the inclusion of government agencies within such a general  
 14 definition of “person” would operate to infringe their sovereign governmental powers.<sup>22</sup>  
 15 Allowing out-of-state government agencies to sue as plaintiffs under the Cartwright Act does  
 16 not operate to infringe their sovereign governmental powers.

17       The legislative history of the Cartwright Act also indicates out-of-state governmental  
 18 entities are persons. When the Legislature amended California Business & Professions Code  
 19

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20 city attorney, or *any other person* who obtained a judgment for restitution against the seller. .  
 21 .”)

21 <sup>21</sup> 15 U.S.C. § 12 defines “persons” as “corporations and associations.” The U.S. Supreme  
 22 Court, in addition to other courts, has found such language to include states and political  
 23 subdivisions as “persons.” Cal. Bus. & Prof. Code § 16702 defines “persons” as “corporations,  
 firms, partnerships and associations.”

22 <sup>22</sup> *See, e.g., City of Los Angeles v. City of San Fernando*, 14 Cal. 3d 199, 276-77 (1975),  
 23 *disapproved of on another point in City of Barstow v. Mojave Water Agency*, 23 Cal. 4th 1224,  
 1248 (2000); *People v. Centr-O-Mart*, 34 Cal. 2d 702, 703-04 (1950); *Hoyt v. Bd. of Civil  
 Service Comm’n*, 21 Cal. 3d 399, 402 (1942); *MTK Mktg.*, 149 F.3d 1036, 1038, 1039-40 (9th  
 Cir. 1998); *see also Wells v. One2One Learning Found.*, 39 Cal. 4th 1164, 1192 (2006) (this  
 maxim of statutory construction applies where the legislative intent is unclear).

1 section 16750(b) to expressly include “the State and any of its political subdivisions and  
 2 political entities” as a person, the legislature also enacted the following explanatory legislation:  
 3 “at the time of the original enactment of section 16750, and at all times since, it intended that  
 4 the State, its political subdivisions or public agencies, be included within the meaning of the  
 5 word ‘person.’” 1961 Cal. Stats. c. 1023, West’s Annotated Cal. Codes, Bus. & Prof. Code §  
 6 16750, Historical and Statutory Notes. Section 16750(b) was enacted to remove any doubts  
 7 concerning the power of local government to bring antitrust actions under the Cartwright Act;  
 8 not to abrogate existing rights under section 16750(a). *County of Stanislaus*, 16 Cal. 4th at  
 9 1153. Thus, the California Legislature intended from the date of enactment, and still intends,  
 10 that the term “person” in section 16750 be construed broadly to include government agencies;  
 11 conversely, nothing in this history suggests that sister state agencies were intended to be carved  
 12 out of section 16750’s reach.

13 California Supreme Court precedent also indicates that section 16750 should be broadly  
 14 construed to include out-of-state government entities. In *County of Stanislaus*, 16 Cal. 4th at  
 15 1155-56, the California Supreme Court held that under section 16750, Stanislaus County could  
 16 bring a civil Cartwright Act action. Section 16750(e) provides that when the California  
 17 Attorney General brings an action alleging federal or state antitrust violations, he or she can  
 18 pool legal resources with “any other state, or any department or agency thereof, any county  
 19 city, public corporation, or public district of this state or of any other state, that has brought or  
 20 intends to bring a similar action.” Cal. Bus. & Prof. Code § 16750(e). The California Supreme  
 21 Court interpreted this provision as a recognition on the part of the Legislature that counties  
 22 could bring a civil action under the Cartwright Act. *County of Stanislaus*, 16 Cal. 4th at 1157.  
 23 Because this same provision refers to actions by “other States,” section 16750(e) constitutes  
 24 legislative recognition that sister States can bring civil Cartwright actions.

25 Interpreting the term “person” to include out-of-state government entities as plaintiffs  
 26 serves the deterrent goals of the Cartwright Act by ensuring that defendants do not benefit

1 from their ill-gotten gains.<sup>23</sup> Consequently, Defendants' Motion to Dismiss as to the out-of-  
 2 state Cartwright Act claims should be denied.

3 **C. The state Attorneys General have the power to file their Cartwright Act claims**

4 Per the analysis above, the burden falls on the Defendants to point to relevant  
 5 provisions of state statutory or state constitutional law that divest the State Attorneys General  
 6 of the common law power to bring these *parens* claims. For the reasons stated below, they can  
 7 not do so.

8 **Delaware:** Defendants' motion incorrectly implies that the only source of authority  
 9 available to the Delaware Attorney General is the Delaware Antitrust Act. The Attorney  
 10 General has both common law authority and statutory authority to bring a California  
 11 Cartwright Act claim on behalf of the State and its entities.

12 The Delaware Attorney General not only has the powers, duties and authority described  
 13 by statute, but also powers, duties and authority that are vested in and imposed upon him by  
 14 the Constitution and common law. Del. Code Ann. tit. 29, § 2504(1). "The Attorney General  
 15 is a constitutional officer vested with the broad authority to exercise numerous and varied  
 16 powers. Absent legislative restriction, the Attorney General may exercise all such power and  
 17 authority as the public interest may from time to time require." *Seth v. State*, 592 A.2d 436,  
 18 439 (Del. 1991). The authority of the Delaware Attorney General to appear in Court for the  
 19 State or its immediate agencies has been "*universally recognized*." *Id.* The Delaware Attorney  
 20 General is also authorized by statute to represent as counsel in all proceedings or actions which  
 21 may be brought on behalf of all officers, agencies, departments, boards, commissions and  
 22 instrumentalities of state government. *See* Del. Code Ann. tit. 29, § 2504(3).

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23 <sup>23</sup> Compare, e.g., *Centr-O-Mart*, 34 Cal. 2d at 704 (1950) (the State was a "person" who could sue to enforce the Uniform Practices Act because it served the public interest), *with State ex rel. Harris v. PriceWaterhouseCoopers, LLP*, 39 Cal. 4th 1220, 1237-38 (2006) (distinguishing *Centr-O-Mart* on the ground that including local government entities within the definition of "person" under the False Claims Act would disserve the public interest).

1       The right to recover state money is a right that belongs to the State of Delaware and the  
 2 Attorney General is the proper State official to bring such an action. *See Richardson v.*  
 3 *Blackburn*, 187 A.2d 823, 823 (Del. Ch. 1963). Furthermore, it is in the public interest for the  
 4 Attorney General to bring an action such as this one to recover damages for the State in  
 5 connection with the Defendants' violations of the Cartwright Act.

6       The Defendants suggest that sections 2105 and 2108(a) of the Delaware Antitrust Act  
 7 somehow limit the authority of the Attorney General to bring claims on behalf of public bodies  
 8 for violations of Delaware's antitrust law or federal antitrust laws. However, nothing in the  
 9 language of these two sections limits the authority of the Attorney General. Nor can the  
 10 language implicitly limit the authority of the Attorney General because any limitation of the  
 11 authority of the Delaware Attorney General must be done "*by express legislative action.*" *See*  
 12 *Seth*, 592 A.2d at 439 (emphasis added).

13       The Defendants, in Appendix A of their Motion to Dismiss, are also requesting the  
 14 Court to dismiss the California Cartwright Act claims brought on behalf of political  
 15 subdivisions. The State of Delaware is a proper party to this suit and once it is in federal court  
 16 in its own behalf, it may proceed under Rule 23 as a class representative of similarly situated  
 17 governmental entities irrespective of State law considerations. *See Illinois v. Bristol-Myers*  
 18 *Co.*, 470 F.2d 1276, 1277-78, (D.C. Cir. 1972).

19       **Hawaii:** Defendants argue that Haw. Rev Stat. § 480-14(b) limits actions on behalf of  
 20 its state agencies to violations of Hawaii or federal antitrust laws. See Defendants' Motion at  
 21 p. 22. This section does not contain the limitation claimed by the Defendants. Rather, this  
 22 section expresses a grant of power to the Attorney General to sue to recover damages; and such  
 23 damages are those provided for by the section, namely "threefold the actual damages  
 24 sustained," Haw. Rev Stat. § 480-14(a), or damages provided for by "any comparable  
 25 provisions of federal law." *Id.* § 480-14(b).

26       Therefore, Defendants' motion to dismiss Hawaii's Cartwright Act claim should be

1 denied.

2       **Kentucky:** The Defendants' assertion that the Kentucky Attorney General's authority  
 3 to bring *parens* claims is limited to the state's antitrust laws is clearly erroneous. The  
 4 Kentucky Attorney General prosecutes his claims in this action under both his state  
 5 constitution and laws, and the California Cartwright Act. The Kentucky Attorney General is a  
 6 state constitutional officer with duties as prescribed by law. Ky. Const. § 91.

7       Under Ky. Rev. Stat. § 15.020, the Kentucky Attorney General is the chief law officer  
 8 of the Commonwealth of Kentucky and has full authority to:

9  
 10 [A]ppear for the Commonwealth in all cases in the Supreme Court or  
     Court of Appeals wherein the Commonwealth is interested, and shall  
     also commence all actions or enter his appearance in all cases, hearings,  
     and proceedings in and before all other courts, tribunals, or commissions  
     in or out of the state, and attend to all litigation and legal business in or  
     out of the state required of him by law, or in which the Commonwealth  
     has an interest, and any litigation or legal business that any state officer,  
     department, commission, or agency may have in connection with, or  
     growing out of, his or its official duties..

14 Ky. Rev. Stat. § 15.020.

15       This authority also extends to all powers granted under common law. *Respass v.*  
 16 *Commonwealth*, 131 Ky. 807, 115 S.W. 1131 (1909). Moreover, Kentucky courts have  
 17 consistently recognized the broad authority of the Attorney General to protect residents.  
*Commonwealth ex rel. Stephens v. N. Am. Van Lines, Inc.*, 600 S.W.2d 459 (Ky. App. 1979);  
*Commonwealth ex rel. Brashear v. ABAC Pest Control, Inc.*, 621 S.W.2d 705 (Ky. App. 1981).  
 21 Nothing in the Kentucky Constitution, law or jurisprudence prevents the Kentucky Attorney  
 22 General from bringing a claim on behalf of all of the states' citizens under the Cartwright Act  
 23 and accordingly, the Defendants' Motion to Dismiss as to the Commonwealth of Kentucky  
 24 should be denied.

25       **Louisiana:** The Louisiana Attorney General brought his claims under both his own  
 26 laws and under the Cartwright Act. Article IV, section 8 of the Louisiana Constitution

provides: “As necessary for the assertion or protection of any right or interest of the state, the Attorney General shall have the authority (1) to institute, prosecute, or intervene in *any* civil action or proceeding.” La. Const. Art. IV, § 8 (emphasis added). The state has a quasi-sovereign interest in the economic well-being of its citizens. If the state has an interest, the Attorney General has a right to assert it in the manner in which he deems necessary.<sup>24</sup> Nothing in the Louisiana Constitution, law or jurisprudence prevents the Louisiana Attorney General from bringing a claim on behalf of all of the states’ citizens under the Cartwright Act.

**North Dakota:** Contrary to Defendants arguments, North Dakota’s authority to assert antitrust claims in this case is not limited to action under its own antitrust laws. The North Dakota Attorney General, as the chief law enforcement officer of the State, has control of litigation involving the State and the procedure by which it is conducted. *Bonniwell v. Flanders*, 62 N.W.2d 25, 28-29 (N.D. 1954). The attorney general is authorized to bring all cases in which the state is a party, “whenever in [its] judgment it would be for the best interests of the state to do so.” N.D. Cent. Code § 54-12-02. Nothing in the North Dakota Constitution, law, or jurisprudence prevents the North Dakota Attorney General from bringing a claim on behalf of North Dakota citizens under the Cartwright Act.

**Northern Mariana Islands:** Within the Commonwealth of the Northern Mariana Islands (“CNMI”), the CNMI Supreme Court has recognized that the Commonwealth has *parens* authority to bring actions where there is a legitimate state interest. *See In re Seman*, 3 N. Mar. I. 57, 71, 1992 WL 135878 (N. Mar. I. 1992). The U.S. District Court for the Northern Mariana Islands has also noted this interest. *See United States ex rel Richards v. De Leon Guerrero*, No. 92-00001, 1992 WL 212237 at \*3 (D.N.M.I July 29, 1992) (order denying stay pending appeal), *aff’d*, 4 F.3d 749 (9th Cir. 1993).

The CNMI Constitution states that “the Attorney General shall be responsible for . . .

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<sup>24</sup> *State ex rel. Porterie v. Smith*, 182 La. 662, 162 So. 413 (1935)

1 representing the Commonwealth in all legal matters.” N. Mar. I. Const. Art. III, § 11. Finally,  
 2 if there were any doubt as to the CNMI Attorney General’s ability to bring this action under its  
 3 *parens* powers, Title 7 of the Commonwealth Code, Section 3401, states as follows:

4       In all proceedings, the rules of the common law, as expressed in the  
 5 restatements of the law approved by the American Law Institute and, to  
 6 the extent not so expressed as generally understood and applied in the  
 7 United States, shall be the rules of decision in the courts of the  
 8 Commonwealth, in the absence of written law or local customary law to  
 9 the contrary.

10      7 N. Mar. I. Code § 3401.

11      In addition to the Cartwright Act, the CNMI brought this claim under express  
 12 provisions granting the Office of the Attorney General authority to enforce the Consumer  
 13 Protection Act, 4 N. Mar. I. Code § 5101 *et seq.*, and the Unfair Business Practices Act, 4 N.  
 14 Mar. I. Code. § 5201 *et seq.*

15      The CNMI also adopts and incorporates the decisions cited by its sister jurisdictions  
 16 herein for support of its position that the CNMI has authority to bring this action on behalf of  
 17 its natural persons and businesses without a specific grant of *parens* authority.

18      **Ohio:** State agencies and political subdivisions are persons entitled to recover under  
 19 the Cartwright Act and the Ohio Attorney General is entitled to act as their attorney. The  
 20 Attorney General is statutorily authorized to act as the attorney at law in any antitrust case for  
 21 state agencies and political subdivisions. Ohio Rev. Code § 109.81. Further, the Attorney  
 22 General is statutorily authorized to “do all things necessary under the laws of *any state* or the  
 23 federal government to properly conduct any antitrust case in which he acts as attorney at law,  
 24 including the bringing of an action for equitable relief or for the recovery of damages.” *Id*  
 25 (emphasis added). Thus, the Attorney General is entitled to assert a damages claim under the  
 26 Cartwright Act.

27      As the *only* argument for dismissal of Ohio’s Cartwright claim, Defendants contend  
 28 that state agencies and political subdivisions are not “persons” under the Cartwright Act.

1 Defendants' assertion is wholly unsupportable. The Cartwright Act provides that an "action  
 2 may be brought by any person who is injured in his or her business or property." Cal. Bus. &  
 3 Prof. Code § 16750(a). Similar language has universally been held to include state agencies  
 4 and political subdivisions.<sup>25</sup> *Chattanooga*, 203 U.S. at 396; *Evans*, 316 U.S. 159. There is  
 5 simply no justification for Cal. Bus. & Prof. Code § 16750(a) to be interpreted contrary to  
 6 established and universal precedent holding state agencies and political subdivisions are  
 7 "persons" -- thus Ohio state agencies and political subdivisions have the same rights under  
 8 section 16750(a) as any private litigant. Defendants rest their argument on Cal. Bus. & Prof.  
 9 Code § 16750(b), which specifically enumerates that the state, its political subdivisions and  
 10 public agencies are persons. However, section 16750(b) was enacted for clarification to  
 11 remove any doubts concerning the power of local government to bring antitrust actions under  
 12 the Cartwright Act; not to abrogate existing rights. *County of Stanislaus*, 16 Cal. 4th at 1153.  
 13 Therefore, section 16750(b) has no effect on the rights enumerated in section 16750(a).

14       **Oklahoma:** Defendants rely on Okla. Stat. tit. 79, § 205(A)(1) for the proposition that  
 15 the Oklahoma Antitrust Reform Act does not affirmatively permit suits by the Oklahoma  
 16 Attorney General on behalf of governmental entities under the antitrust laws of another state.  
 17 However, there is nothing in the Antitrust Reform Act which *prohibits* the Attorney General  
 18 from bringing such an action. In fact, under Oklahoma law the Attorney General is given broad  
 19 powers to represent the interest of the state in any action and in any court under Okla. Stat. tit.  
 20 74, § 18b.

21       **Pennsylvania:** Defendants' argument that the Pennsylvania Attorney General lacks the  
 22 authority to represent the Commonwealth, state agencies and political subdivisions under the  
 23 Cartwright Act is incorrect. Nothing in 71 Pa. Stat. § 732-204 (c), the statute Defendants rely  
 24

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25 15 USC § 12 defines persons as "corporations and associations." The U.S. Supreme Court,  
 26 in addition to other courts, has found such language to include states and political subdivisions  
 as "persons." Under California Bus. & Prof. Code § 16702 the definition of person includes  
 "corporations, firms, partnerships and associations."

1 on, limits the authority of the Pennsylvania Attorney General to bring an action under the  
 2 Cartwright Act.

3       **Texas:** The Attorney General of Texas is both obligated by the Texas Constitution and  
 4 entitled by statute to represent government purchasers for violations of the state antitrust laws,  
 5 a necessary extension of which is the right to sue under the Cartwright Act. The Constitution  
 6 mandates that the Attorney General “take such action in the courts as may be proper and  
 7 necessary to prevent any private corporation from exercising any power or demanding or  
 8 collecting any species of taxes, tolls, freight or wharfage not authorized by law.” Tex. Const.  
 9 Art. IV, § 22. While this section begins with the rights of the Attorney General to sue in Texas  
 10 state courts, the mandate to represent the State “as may be proper and necessary” is not limited  
 11 in the same jurisdictional manner. *Id.* By statute, the Attorney General is required to represent  
 12 aggrieved state agencies: “The Attorney General shall prosecute and defend all actions in  
 13 which the state is interested before the supreme court and courts of appeals.” Tex. Gov’t Code  
 14 § 402.021. The 5<sup>th</sup> Circuit has recognized that this grant necessarily encompasses federal  
 15 courts as well: “Under Texas law, the Attorney General enjoys an exclusive right to represent  
 16 state agencies. . . .” *U.S. v. State of Texas*, 680 F.2d 356, 368 n.16 (5th Cir. 1982) (*citing*  
 17 V.A.T.S. art. 4395 (repealed, now Tex. Gov’t Code § 402.021)). The instant suit is one that  
 18 the Attorney General deems necessary to protect Texas state agencies and one which no  
 19 statutory authority or case law dictates is improper for the State to bring.

20       **Utah:** In their Motion, Defendants assert that “only government agencies of California,  
 21 and not those in other states, have a remedy for violations of the Cartwright Act” and the  
 22 Cartwright Act “explicitly restricts *parens patriae* claims for damages to suits by the  
 23 *California* Attorney General on behalf of residents of *the State of California*. . . .” Defendants’  
 24 Motion, p. 18.

25       The Utah Antitrust Act, Utah Code Ann. §§ 76-10-911 *et seq.*, alleged by Utah along  
 26 with the Cartwright Act as statutory bases for its state law claims (see First Amended

1 Complaint, Paragraph 186), expressly provides, in Utah Code Ann. § 76-10-916(3), that:

2 [t]he Attorney General may proceed under *any antitrust laws* in the state  
 3 or federal courts on behalf of this state, any of its political subdivisions  
 4 or agencies, or as *parens patriae* on behalf of natural persons in this  
 state. (Emphasis supplied.)

5 Utah Code Ann. § 76-10-916(3).

6 This statute provides explicit legislative authority for the Utah Attorney General to  
 7 proceed under “any antitrust laws” (including, therefore, the Cartwright Act), on behalf of the  
 8 State of Utah, its state agencies and political subdivisions, and as “*parens patriae*” on behalf of  
 9 natural persons in Utah. Thus, Utah’s own law authorizes its Attorney General to bring suit  
 10 under the Cartwright Act, as he has done in this action, on behalf of the State of Utah and its  
 11 governmental entities and as parens claims on behalf of natural persons in Utah.

12 Furthermore, the Utah Attorney General has authority under the common law of Utah  
 13 to represent Utah state agencies and political subdivisions and Utah citizens as *parens* as  
 14 alleged in this action. The Utah Supreme Court has recognized that:

15 in addition to those conferred on it by statute, the office [of the  
 16 Utah Attorney General] is clothed with all of the powers and  
 17 duties pertaining thereto at common law; and, as chief law  
 18 officer of the State, the Attorney General, in the absence of  
 19 express legislative restriction to the contrary, may exercise all  
 such power and authority as the public interests may from time  
 to time require. In short, the Attorney General’s powers are as  
 broad as the common law unless restricted or modified by  
 statute.

20 *State v. Jiminez*, 588 P.2d 707, 709 (Utah 1978).

21 Notably, Defendants’ Motion makes no mention of these statutory and common law  
 22 provisions and contains no argument to the contrary. Furthermore, Defendants’ argument in  
 23 Section II.B of their Motion that Utah cannot assert claims on behalf of its government entities  
 24 in this case because Utah’s laws do not authorize it to bring suits in a *parens* capacity under  
 25 California’s laws, is inapposite. The Utah Attorney General is representing Utah’s  
 26 governmental entities directly, in a proprietary/representative capacity, as expressly authorized

1 by Utah Code Ann. § 76-10-916(3), and not as *parens*.

2       The fact that the Cartwright Act expressly authorizes the California Attorney General to  
 3 bring civil actions as *parens* on behalf of California residents does not limit the authority of the  
 4 Utah Attorney General to proceed as he is authorized to do under Utah law. Nothing in the  
 5 Utah Constitution, law, jurisprudence or policy purports to prevent or restrict the Utah  
 6 Attorney General from bringing claims on behalf of Utah, its governmental entities and natural  
 7 persons under the Cartwright Act. Indeed, access to courts in California by Utah governmental  
 8 entities and natural persons is consistent with the access to courts in Utah guaranteed to  
 9 governmental entities and citizens of Utah *and other States* by the “open courts” provision of  
 10 Article I, section 11 of the Utah Constitution, which states: “All courts shall be open, and every  
 11 person, for an injury done to him in his person, property or reputation, shall have remedy by  
 12 due course of law . . . .”<sup>26</sup> Utah Const. Art. I, § 11. Nor, for the reasons stated elsewhere in  
 13 this Opposition to Defendants’ Motion, does anything in the Cartwright Act, the California  
 14 Constitution, law, jurisprudence or policy purport to prevent or restrict the Utah Attorney  
 15 General from using the authority given to him by the laws of Utah to obtain relief for Utah or  
 16 its governmental entities or natural persons for violations of the Cartwright Act.

17       **Virginia:** The Defendants assert that Virginia “has limited representative actions by its  
 18 state Attorney General on behalf of political subdivisions to violations of Virginia’s antitrust  
 19 statute, not California’s Cartwright Act or other states’ antitrust laws.” The Defendants’  
 20 assertion is not accurate. Va. Code § 2.2-507 states, in relevant part:

21                  All legal service in civil matters for the Commonwealth, the  
 22 Governor, and every state department, institution, division,  
 commission, board, bureau, agency, entity, official, court, or

---

23       <sup>26</sup> This provision “ensures that courts are to be accessible to all for resolution of their disputes,  
 24 and makes clear that right to come into court is a fundamental value of governmental  
 25 compact.” *Jeffs v. Stubbs*, 970 P.2d 1234, 1250 (Utah 1998), *cert. denied*, 526 U.S. 1130  
 26 (1999). Its purpose is to “impose some substantive limitation on the power of the legislature to  
 abolish judicial remedies in a capricious fashion.” *Craftsman Builder’s Supply, Inc. v. Butler  
 Mfg. Co.*, 974 P.2d 1194, 1204 (Utah 1999).

judge, including the conduct of all civil litigation in which any of them are interested, shall be rendered and performed by the Attorney General, except as provided in this chapter and except for any litigation concerning a justice or judge initiated by the Judicial Inquiry and Review Commission.

Va. Code § 2.2-507.

This statute provides clear authority for the Attorney General to pursue all civil claims on behalf of state agencies. The statute makes no mention of any limitations in forum or statutes under which these cases can be brought and does not purport to limit the Attorney General's authority only to Virginia law. Furthermore, nothing in the Virginia Antitrust Act purports to limit the Attorney General's ability to bring antitrust cases on behalf of the Commonwealth, or consumers and governmental entities within the Commonwealth, solely to causes of action that arise under the Virginia Antitrust Act. In addition to statutory authority, the Virginia Attorney General brings this action pursuant to his common law authority to act on behalf of the best interests of the citizens of the Commonwealth in matters of public interest. One general principle stemming from the common law powers of the Attorney General is the right to institute legal proceedings in the interests of the Commonwealth's agencies and political subdivisions. In many states, including Virginia, the common law powers of state attorneys general continue in the absence of statutory abrogation. See *Commonwealth v. Meadow Gold Dairies, Inc.*, 1993-2 Trade Cas. (CCH) ¶70,385 at 71,025 (W.D. Va. Aug. 19, 1993) (citing *Nash County Bd. of Educ. v. Biltmore Co.*, 640 F.2d 484, 494 (4<sup>th</sup> Cir.), cert. denied, 454 U.S. 878 (1981)); *Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266 (5th Cir. 1976), cert. denied, 429 U.S. 829 (1976). Courts have stated that in the absence of specific abrogation by the legislature the Attorney General typically may exercise all such authority as the public interest requires, and has wide discretion in making the determination as to public interest. See *Meadow Gold Dairies*, 1993-2 Trade Cas. (CCH) ¶70,385 at 71,025 (W.D. Va. Aug. 19, 1993) (citing *Exxon*, 526 F.2d at 268-69).

Commentary by one of Virginia's leading constitutional scholars supports the

1 conclusion that Virginia's Attorney General retains those common law powers which have not  
 2 been abrogated:

3       The historical development of the office, coupled with  
 4 precedents from states with comparable constitutional and  
 5 statutory schemes, would argue in favor of the existence of such  
 6 power springing from common law. In most states where the  
 7 constitution says that the Attorney General's duty shall be 'as  
 8 prescribed by law,' this is taken to mean that he has such  
 9 common law powers as have not been specifically repealed by  
 10 statute -- a conclusion sometimes bolstered by reference to early  
 11 statutory adoption of the common law.

12 II A.E. Dick Howard, Commentaries on the Constitution of Virginia 665-66 (referring to Va.  
 13 Const. Art. V, § 15 and Va. Code Ann. § 1-10) (*citations omitted*).

14       Far from being repealed by statute, Virginia's statutory model specifically envisions its  
 15 Attorney General representing the interests of state governmental entities in *all* civil litigation,  
 16 regardless of the forum or the statute under which such litigation is pursued. See Va. Code  
 17 Ann. § 2.2-507. To hold that Virginia's Attorney General cannot pursue a Cartwright Act  
 18 claim in order to adequately protect the interests of Virginia's state agencies and political  
 19 subdivisions is directly contrary to both common law and the statutory scheme in Virginia.

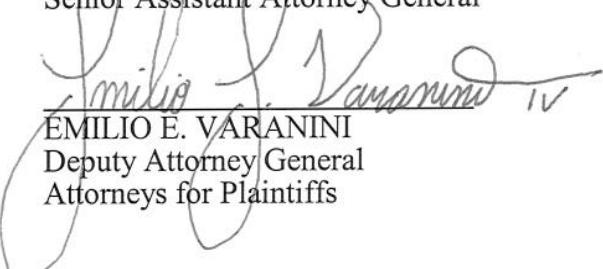
## CONCLUSION

20       Defendants' motion should be denied in its entirety. States have clear authority to  
 21 bring this case to request relief on behalf of their injured consumers, whether direct or indirect.  
 22 In addition to federal remedies, states are seeking relief under state laws. The beneficial  
 23 purpose of the Cartwright Act applies to all plaintiffs, not just those located within the state of  
 24 California and it should be interpreted broadly to provide adequate consumer relief.

1 Dated: December 13, 2006

2 Respectfully submitted,

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Signature page for the state of ALASKA for  
Plaintiffs' Opposition to Motion to Dismiss for Failure to State a Claim in  
*The State of California et al. v. Infineon Technologies AG, et al.*  
U.S. District Court, N. D. California, No. C 06-4333 PJH

DATED this 8th day of December, 2006, at Anchorage, Alaska.

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*The State of California et al. v. Infineon Technologies AG, et al.*  
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*The State of California et al. v. Infineon Technologies AG, et al.*  
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*The State of California et al. v. Infineon Technologies AG, et al.*  
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*The State of California et al. v. Infineon Technologies AG, et al.*  
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*The State of California et al. v. Infineon Technologies AG, et al.*  
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U.S. District Court, N. D. California, No. C 06-4333 PJH

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U.S. District Court, N. D. California, No. C 06-4333 PJH

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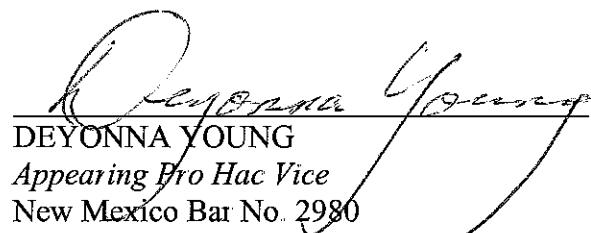
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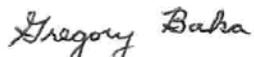
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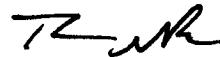
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U.S. District Court, N. D. California, No. C 06-4333 PJH

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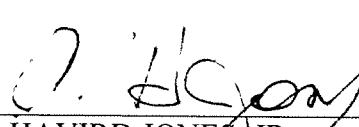
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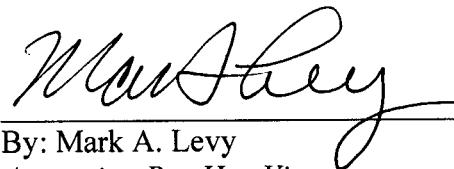
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*The State of California et al. v. Infineon Technologies AG et al.*, Case No. C 06-4333 PJH

Dated: December 7, 2006  
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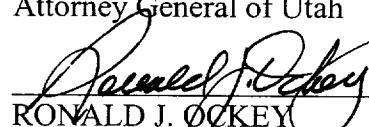
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U.S. District Court, N. D. California, No. C 06-4333 PJH

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U.S. District Court, N. D. California, No. C 06-4333 PJH

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Plaintiffs' Opposition to Motion to Dismiss for Failure to State a Claim in  
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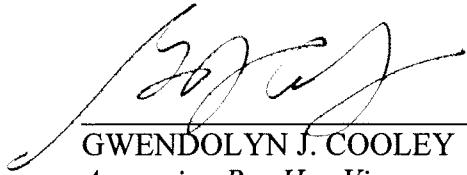


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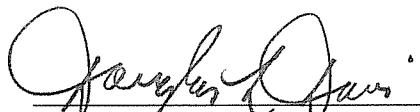
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